



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 2044 057 654 550

HARVARD LAW LIBRARY



REPORTS

OF

C A S E S

ADJUDGED IN THE

Court of Chancery

OF

NEW-YORK.

BY WILLIAM JOHNSON,

COUNSELLOR AT LAW.

VOL. II.

CONTAINING THE CASES FROM JANUARY, 1816,

TO SEPTEMBER, 1817, INCLUSIVE.

Second Edition, Revised and Corrected

PHILADELPHIA:

PUBLISHED BY E. F. BACKUS.

1837.

SOUTHERN DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the second day of April, in the forty-second year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit :

" Reports of Cases adjudged in the Court of Chancery of New-York. By William Johnson, Counsellor at Law. Vol. II. containing the Cases from January, 1816, to September, 1817, inclusive."

In conformity to the act of the Congress of the United States, entitled, " An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned ;" and also to an act, entitled, " An act, supplementary to an act, entitled, An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES DILL,

Clerk of the Southern District of New-York.

JUNE 11-1929

848

7/2/41

TABLE

OF

THE CASES REPORTED.

* * The letter *v.* follows the name of the plaintiff.

A.

Abbot <i>v.</i> Allen.....	519
Adsit <i>v.</i> Adsit.....	448
Allen, Abbot <i>v.</i>	519
Anderson, Roberts <i>v.</i>	202
Annin, Tice <i>v.</i>	125
Armstrong, Wiggins <i>v.</i>	144
Attorney-General <i>v.</i> Utica Ins. Co.....	371

B.

Baldwin, King <i>v.</i>	554
Barker, Matter of.....	232
Barlow, Todd <i>v.</i>	551
Beardsley, Getman's Executors <i>v.</i>	274
Beaty <i>v.</i> Beaty.....	430
Belknap <i>v.</i> Belknap.....	463
Bennet <i>v.</i> Winter.....	205
Berry <i>v.</i> The Mutual Ins. Co....	603
Blachly, admr. of Vail, Wiser <i>v.</i>	488
Botsford <i>v.</i> Burr.....	405
Brady <i>v.</i> Waldron.....	148
Brasher's Executors <i>v.</i> Van Cort- landt,.....	242, 400, 505
Brinkerhoff <i>v.</i> Thallhimer.....	486
Brown <i>v.</i> Ricketts.....	425
——, Hamersley <i>v.</i>	428
Burr, Botsford <i>v.</i>	405

C.

Clowes, Hawley <i>v.</i>	122
Codd <i>v.</i> Codd.....	141, 224
Coddington, Dean <i>v.</i>	201
Consequa <i>v.</i> Fanning.....	481
Coster, Matter of.....	503
Crumb, <i>Ex parte</i>	439

D.

Davoue <i>v.</i> Fanning.....	252
Dayton, Skinner <i>v.</i>	226, 526
Dean, Livingston <i>v.</i>	479
—— <i>v.</i> Coddington.....	201
Deaves, Heyer <i>v.</i>	154
Demarest <i>v.</i> Wynkoop.....	461
Denton <i>v.</i> Jackson.....	320
Depeyster <i>v.</i> Graves.....	148
Dey <i>v.</i> Dunham.....	182
Dodge <i>v.</i> Strong.....	228
Dumond <i>v.</i> Magee.....	240
Dunham, Dey <i>v.</i>	182
Dyer's heirs <i>v.</i> Potter.....	152

E.

Eastburn <i>v.</i> Kirk.....	317
------------------------------	-----

Ellis, Peck <i>v.</i>	131
Ellridge <i>v.</i> Hill.....	261

F.

Fanning, Davoue <i>v.</i>	252
——, Consequa <i>v.</i>	481
Ferguson <i>v.</i> Smith.....	139
Finster, Murray <i>v.</i>	156
——, Heatley <i>v.</i>	159
Fort <i>v.</i> Ragusin.....	146
Franklin, Osgood <i>v.</i>	1
—— <i>v.</i> Osgood.....	1

G.

Gardner <i>v.</i> Newburgh.....	162
Garr <i>v.</i> Garr.....	542
Gere, Johnson <i>v.</i>	546
General Rule.....	153
Getman's Executors <i>v.</i> Beardsley	274
Gillespie <i>v.</i> Moon.....	585
Goodhue, People <i>v.</i>	198
Graves, Depeyster <i>v.</i>	148

H.

Ham <i>v.</i> Schuyler.....	140
Hamersley <i>v.</i> Brown.....	428
—— <i>v.</i> Lambert....	432, 508
Hammond <i>v.</i> M'Lea.....	493
Hart <i>v.</i> Ten Eyck.....	62, 513
Hawley <i>v.</i> Clowes.....	122
Heatley <i>v.</i> Finster.....	159
Hendricks <i>v.</i> Robinson...	283, 484
Heyer <i>v.</i> Deaves.....	154
Hill, Ellridge <i>v.</i>	261
Hildreth <i>v.</i> Sands.....	35
Hodgson, Kirk <i>v.</i>	550
Holridge <i>v.</i> Gillespie.....	30
Howard <i>v.</i> Moffatt.....	206
Hubbell, Sells' Administrator <i>v.</i>	394
Hubbs, Livingston <i>v.</i>	512

J.

Jackson, Denton <i>v.</i>	320
---------------------------------	-----

Jacques <i>v.</i> Methodist Episcopal Church.....	543
Johnson, Lupton <i>v.</i>	429
—— <i>v.</i> Gere.....	546

K.

King <i>v.</i> Baldwin.....	554
Kirk, Eastburn <i>v.</i>	317
—— <i>v.</i> Hodgson.....	550

L.

Lambert, Hamersley <i>v.</i>	432, 508
Lansing <i>v.</i> Starr.....	150
Livingston <i>v.</i> Dean.....	479
—— <i>v.</i> Hubbs.....	512
—— <i>v.</i> Livingston.....	537
Lupton <i>v.</i> Johnson.....	429
Lyman <i>v.</i> Sale.....	487
Lylburn, Murray <i>v.</i>	441
Lyman <i>v.</i> United Ins. Company	630
Lynch, Stoughton <i>v.</i>	209
Lyon <i>v.</i> Richmond.....	51
Lupton <i>v.</i> Lupton.....	614

M.

M'Farlan, Matter of.....	440
M'Lea, Hammond <i>v.</i>	493
Magee, Dumond <i>v.</i>	240
Malin <i>v.</i> Malin.....	238
Mason <i>v.</i> Sudam.....	172
Methodist Church, Jaques <i>v.</i> ...	543
Merrill, Shepard <i>v.</i>	276
Moffatt, Howard <i>v.</i>	206
Moody <i>v.</i> Payne.....	548
Moon, Gillespie <i>v.</i>	585
Murray <i>v.</i> Finster.....	155
—— <i>v.</i> Lylburn.....	441
——, Riggs <i>v.</i>	565
Mutual Ins. Co., Berry <i>v.</i>	603

N.

Newburgh, Gardner <i>v.</i>	102
-----------------------------------	-----

TABLE OF CASES.

5

O.

Osgood, Franklin v..... 1

Strong, Dodge v..... 228
Sudam, Mason v..... 173
Swaim, Perine v..... 475

P.

Payne, Moody v..... 548
Peck v. Ellis..... 131
People v. Goodhue..... 198
Perine v. Swaim..... 475
Perkins, Matter of..... 124
Phillips v. Thompson..... 418
Porter v. Spencer..... 169
Potter's heirs, Dyer's heirs v.... 152

T

Ten Eyck, Hart v..... 62, 515
Terry, Van Vechten v..... 195
Thalhimer, Brinkerhoff v..... 483
Thompson, Phillips v..... 418
Tice v. Annin..... 125
Todd v. Barlow..... 551
Turrel v. Turrel..... 391

R.

Ragusin, Fort v..... 146
Remsen v. Remsen..... 295
Richmond, Lyon v..... 51
Ricketts, Brown v..... 425
Riggs v. Murray..... 565
Roberts v. Anderson..... 202
Robinson, Hendricks v.... 283, 484

U.

Underhill v. Van Cortlandt..... 339
United Ins. Co., Lyman v..... 630
Utica Insurance Company, At-
torney-General v..... 371

V.

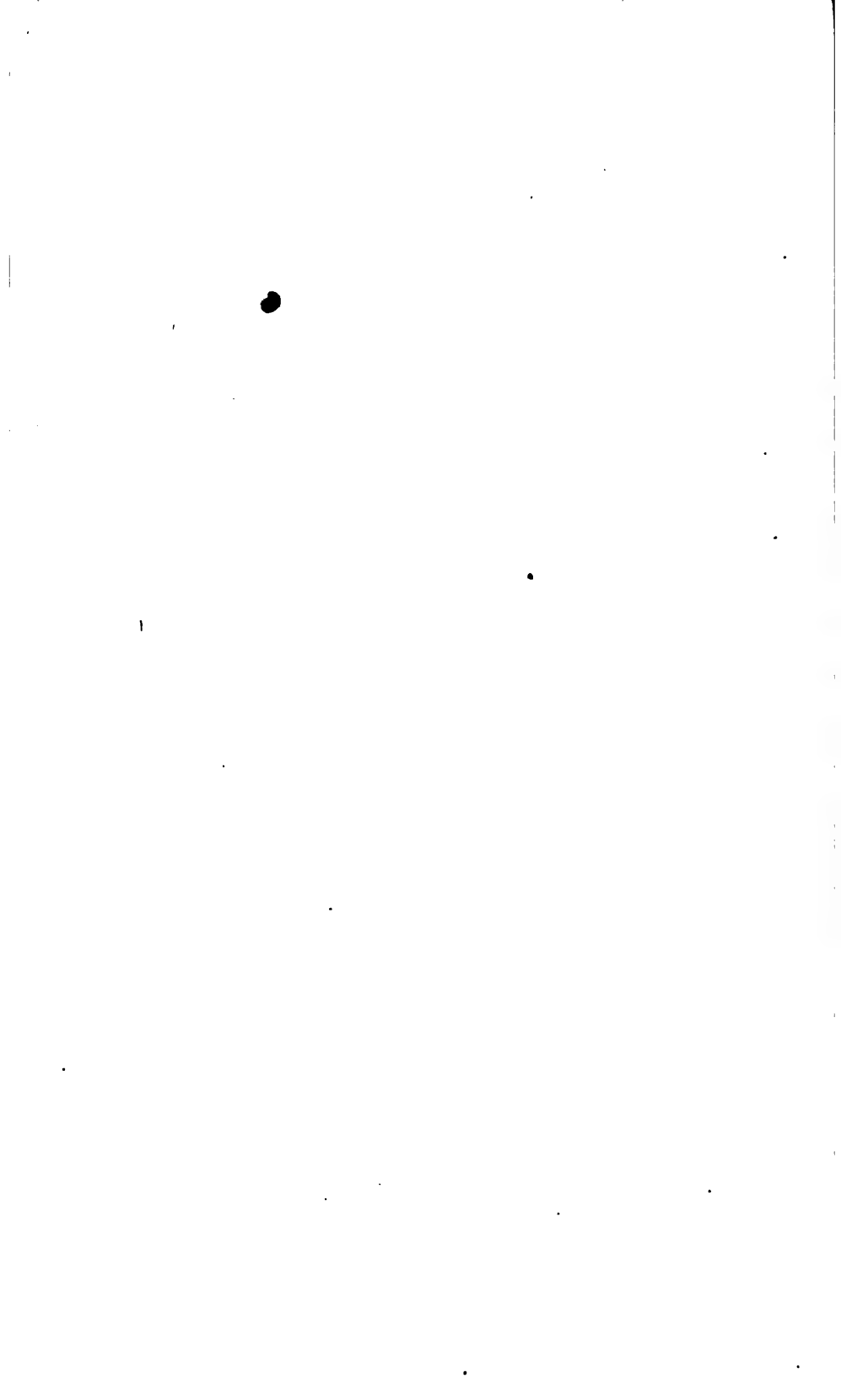
Van Bergen v. Van Bergen.... 272
Van Cortlandt, Brasher's Execu-
tors v..... 242, 400, 505
_____, Underhill v..... 339
Van Vechten v. Terry..... 197

S.

Sale, Lyman v..... 487
Sands, Hildreth v..... 35
Sells' administrators v. Hubbell. 394
Schuyler, Ham v..... 140
Shepard v. Merrill..... 276
Skinner v. Dayton..... 226, 526
Smith, Ferguson v..... 139
Spencer, Porter v..... 169
Starr, Lansing v..... 150
Stoughton v. Lynch..... 209

W.

Waldron, Brady v..... 148
Wiggins v. Armstrong..... 144
Winter, Bennet v..... 205
Wiser v. Blachly..... 488
Wynkoop, Demarest v..... 461



CASES

ADJUDGED IN

The Court of Chancery

OF

NEW-YORK.

JAMES KENT, Esq., CHANCELLOR.

OSGOOD and others *against* FRANKLIN and others.

1816.

FRANKLIN and others *against* OSGOOD and others.

OSGOOD
V.
FRANKLIN

If executors, empowered to sell the real estate of the testator, are vested with a legal or equitable *interest* in the estate, or are charged with a *trust*, the execution of which depends on the sale, the power survives. Mere *inadequacy of price* is not a sufficient ground for setting aside a sale, unless the inadequacy be so gross and palpable, as, of itself, to afford evidence of actual fraud.

A trustee is not chargeable with more than he has received of the trust estate, unless there is evidence of very gross negligence, amounting to wilful default.

If the probate of a will be taken out, before the hearing of a cause, it is sufficient to support the plaintiff's demand; no objection having been made to the want of it, by pleading.

Where some of the plaintiffs became insolvent, and on a bill of revivor, their assignees were made defendants, and it was objected at the hearing, that they ought to have been made plaintiffs, it was held, that they could not be made plaintiffs against their consent, and having answered as defendants, the Court might infer their refusal to be plaintiffs, and being before the Court as parties, it was sufficient.

THESE were *original* and *cross* suits. The original bill was filed in *November*, 1808, by *Samuel Osgood*, and *Mary* his wife, she being the sole surviving executrix of *the last will and testament of *Walter Franklin*, deceased, her former husband, against the executors of *Samuel Franklin*, deceased, the executors of *John Franklin*, deceased, the executors of *Thomas Franklin*, deceased, and the residuary legatees of the testator.

September 29th.
October 2d, 3d,
4th, 5th, 1815,
and January
15th, 1816.

[* 2]

1816.

OSGOOD
v.
FRANKLIN.

Walter Franklin, being possessed of a large real and personal estate, on the 21st of *February*, 1778, made his will, and, after some specific legacies, devised the residue of his estate as follows: *one eighth* part thereof was directed to be put out at interest, and the interest thereon he gave to his sister, *Sarah Corsa*, for her life, and after her decease the principal and interest to her daughter, *Mary Corsa*; *one eighth* to the use of his sister, *Mary Wistar*, for life, and after her death, to her four children, *Thomas*, *Catharine*, *Sarah*, and *Mary*, (defendants); *one eighth* part to his daughter *Maria*, (now the wife of *De Witt Clinton*;) and *one eighth* part to his daughter *Sarah*, (the wife of *John L. Norton*;) and to each of his three brothers, *John*, *Thomas*, and *Samuel*, he gave *one eighth*; and appointed his wife *Mary*, and his brothers, *John*, *Thomas*, and *Samuel*, executors of his will, upon the express condition and proviso, that if they owed him, the testator, any debts at the time of his decease, the same should be paid for the general benefit of his estate; and if they did not act on that condition, they were not to be executors. The will also contained the following clauses: "I give to my executors that may act, and to the major part of them, their heirs or executors, full power to sell, and to assign and convey away, any or all my houses, lands and tenements, and that forever, that are not already given away in this will foregoing." "I order that the money and effects be distributed and divided from time to time, as it can be raised from my debts and estates, by my executors hereafter named; but they are to be careful to keep a sufficiency undivided, to pay off all legacies as they become due, and to keep the estate as much on interest, or *rents, as they can, for the general benefit, and to be careful to take such securities for the money as they think is certainly good, by mortgages or personal securities, some security to be taken to every single person's bond." The testator died on the 1st of *August*, 1780. The will was proved in 1780, and letters testamentary granted to *John* and *Samuel*, who acted as executors; *Thomas*, the other executor named, declining to act

[* 3]

The bill charged that from the death of the testator, *John* and *Samuel* were the only acting executors, as long as they lived, respectively, and had the sole possession, management, and disposition of the estate, and collected and took into their hands large parts of the personal estate, and sold parts of the real estate, and employed the moneys received by them in trade. That *John Franklin* died in *September*, 1801, and *Samuel*, afterwards, continued sole acting executor until he died in *September*, 1807. That *John*, *Samuel*, and *Thomas*, were jointly indebted to the testator, at the time of his death

in a large sum, which was still unpaid; and that *John* and *Thomas*, separately, were indebted to the testator in large sums, which were still unpaid. That the plaintiff *Mary*, the wife of the testator, married the plaintiff *Samuel Osgood*, on the 24th of *May*, 1786.

1816.

Osgood
v.
Franklin.

That, after the death of *Samuel Franklin*, the plaintiffs, *Samuel Osgood*, in right of his wife, and *Mary Osgood*, undertook the execution of the will of the testator, and the administration of the unsettled estate. That all the specific legacies were paid, and the debts discharged; that *John Franklin* and *Samuel Franklin* were, at the time of their deaths, respectively, largely indebted to the estate of the testator, for moneys and property received by them as executors, and which debts were still unpaid. That the plaintiffs had endeavored to collect and convert into money all the remaining property and estate of the testator, *in order to make a final distribution and settlement thereof. That the plaintiffs, as sole acting and surviving executors of the testator, had sold, in *June*, 1808, all the residue of the real estate not before disposed of or wasted, for the sum of 25,000 dollars, which they had received; which sum, and 347 dollars, due to the estate, are all they had received from the estate, and, excepting the debts before stated and unpaid, all they had knowledge of, or expected would be recovered or obtained from the estate; that *Thomas Franklin*, who never acted, and who was deceased, by his will, made his two sons, *Walter Franklin* and *Thomas R. Franklin*, and *Samuel Pleasants*, his son-in-law, his executors, (defendants,) to whom he gave all his estate; that *Abraham* and *John Franklin*, sons of *Samuel Franklin*, and executors of his will, were insolvents; and that some of the executors of *John Franklin*, who were his sons, *Thomas*, *Anthony*, and *Walter Franklin*, and his son-in-law, *John Townsend*, were also insolvent.

[* 4]

The bill called for an account and payment from the executors of *John*, *Samuel*, and *Thomas Franklin*, respectively, and for a discovery, and that the residue of the estate might be distributed so that the plaintiffs might be protected; and that if the sums due from the executors of *Samuel*, *John*, and *Thomas Franklin*, respectively, or either of them, should be found to exceed the share due to each out of the residuary estate of the testator *W. F.*, the balance might be paid to the plaintiffs, &c.

The answer of the executors of *Samuel Franklin* admitted the facts stated in the bill, except that they alleged that the sale and conveyance of the residue of the real estate by the plaintiffs was not valid, because the plaintiffs had no power to sell, and that the lands sold were of much greater value than the sum for which they were sold; and they annexed

1816.

OSGOOD
V.
FRANKLIN.

[* 5]

to their answer schedules and statements of all the acts and accounts of *Samuel Franklin*, as acting *executor of the testator *W. F.*, which admitted that their testator *S. F.* employed the money in his hands as executor, in his own business, and for which interest was charged, leaving a balance of 900 dollars; and the schedules also admitted a balance of 13,000 dollars from *Samuel* and *John*, as executors of *W. F.*, and of 6000 dollars from *Samuel*, acting as sole executor.

The answer of the executors of *John Franklin* admitted most of the facts charged in the bill; but stated that they did not know whether their testator was indebted jointly or separately, or not; nor whether he was separately indebted, or had any moneys in his hands, at the time of his death, belonging to the estate of *W. F.* They alleged, that the sale of the residue of the real estate of *W. F.* by the plaintiffs *Samuel Osgood*, and *Mary* his wife, to *John L. Norton* and *De Witt Clinton*, was fraudulent, having been made collusively, and for an inadequate price.

The answer of the executors of *Thomas Franklin* also admitted most of the facts charged in the bill; but stated that they knew nothing of any debt due from *T. F.*, their testator, jointly with *S. F.*, to *Walter Franklin*; and that the separate debt of their testator to *W. F.* had been fully paid and discharged. They alleged, that the sale of the residue of the real estate of *W. F.* by the plaintiffs, was void for want of power, and for inadequacy of price.

The answer of *De Witt Clinton*, and *Maria* his wife, and of *John L. Norton*, and *Sarah* his wife, admitted, in substance, the facts charged in the bill.

The other defendants, in their answer, admitted the facts charged in the bill, except that they were ignorant of the debts charged to be due to the estate of *W. F.*, and of the acts of *S. F.* and *John F.*, the acting executors; and they objected that the sale of the residue of the real estate by the plaintiffs, was void for want of power, and for inadequacy of price.

General replications were filed to the answers.

[* 6]

*Pending the suit, *Samuel Osgood* died, and *Mary Osgood*, his wife, afterwards died, and the suit was afterwards revived by, and in the names of, the present plaintiffs, as proper parties.

The *cross bill* was filed on the 7th of June, 1809, (most of the plaintiffs being the defendants in the original suit,) against *Samuel Osgood*, and *Mary* his wife, *De Witt Clinton*, and *Maria* his wife, and *John L. Norton*, and *Sarah* his wife. It set forth the will of the testator *W. F.*, which contained a power to the executors to sell, as follows: "I give to my executors, *that they may act*, and to the major part of them, their heirs or executors, full power to sell,"

1816.

OSGOOD
V.
FRANKLIN.

&c., (a) and gave to each of his executors who should act, the sum of 200 pounds, in lieu of all commissions, &c. for executing his will. After stating several facts, as in the original suit, the bill further stated, that the residue of the real estate of *W. F.*, which remained unsold at the time of the decease of *Samuel Franklin*, acting executor, consisted of the following tracts, viz. about 3,800 acres of land, on the southerly side of the *Mohawk* river, in all or one of the counties of *Otsego*, *Schoharie* and *Montgomery*; 4,000 acres of land in the same counties; about 4,600, in one or all of the same counties; a tract of land on or near lake *George*, the quantity of which was unknown to the plaintiffs; 850 acres in *Queensberry*, in *Washington* county; 12 lots of land on the *Susquehannah* river; a tract of about 5,000 acres on or near *Hillsborough*, in the state of *Vermont*; another tract, of about 5,000 acres, in or near *Reading*, in *Vermont*; a tract of 1,000 acres, in or near *Holton*, in the same state; nine rights in the township of *Cavendish*, in the same state; *and fourteen rights in the township of *Draper*, in the same state; and that there were, as they believed, various other tracts of land, belonging to the estate of *W. F.*, but which they were unable to particularize, the deeds, papers, &c., being in the hands of the defendants, or some of them. That the tracts of land referred to, at a fair valuation, were worth 200,000 dollars, and that sum could have been obtained for them, if reasonable pains had been taken for the disposal thereof. That *Mary Osgood*, as surviving executrix, had no power to sell the real estate; but if she had power, the sale ought not to be carried into effect, because the plaintiffs alleged that *Samuel Osgood*, and *Mary* his wife, *John L. Norton*, and *De Witt Clinton*, well knew the value of the said residuary estate, and corruptly and collusively agreed among themselves, for the purpose of defrauding the plaintiffs of their just proportions of the same; that the said *Samuel Osgood*, and *Mary* his wife, by virtue of her supposed authority under the will of *W. F.*, should execute conveyances in fee to *Norton* and *Clinton*, for all the residuary estate, for the small and inadequate sum, compared with its real value, of 25,000 dollars; and, in pursuance of such corrupt and fraudulent agreement, the sale and conveyance was made; and they insisted, that if *Samuel Osgood* and his wife have sold the lands for this inadequate considera-

[* 7]

(a) It appeared that the original will could not be found, and that there had been two probates of it; one before *Cary Ludlow*, Esq., surrogate, the 22d of August, 1780, in which the words of the power to sell are as stated above by the plaintiffs in the cross suit: the other probate of it was before Judge *Tredwell*, the 15th of August, 1786, in which the words are as stated by the defendants, to wit: "I give to my executors *that may act*, and to the major part of them," &c.

1816.

OSGOOD
V.
FRANKLIN.

tion, through ignorance of their real value, their negligence in not ascertaining the value thereof, which might have been easily done, was so gross and inexcusable as to render them responsible for the full value of the lands. The bill prayed for an account; and that the sale and conveyances of the residuary estate might be set aside, and the estate sold, and the proceeds thereof distributed, &c.; or that *Samuel Osgood*, and *Mary* his wife, might account for it, at its true value, and all the title deeds, &c. be brought into Court, and that they account for the personal estate, &c. &c.

[* 8]

*The answer of *Samuel Osgood*, and *Mary* his wife, to the cross bill, was filed the 29th of *September*, 1809. They stated, that the executors were appointed on condition of not being discharged from their debts owing to the testator. That the power to sell, in the will, was in these words: "I give to my executors *that may act*, and to the major part of them, their heirs, or executors, full power to sell," &c., according to an authenticated copy thereof in their possession; that the original will was not in their possession, nor did they know where it was, unless it was in the possession of the representatives of *John* and *Samuel Franklin*, as the defendant *Mary Osgood*, a few days after the death of the testator, delivered it to them, and it never has been in her possession, nor has she seen it since; nor has the said *Samuel Osgood* ever seen the original will. That *John* and *Samuel* were the only acting executors during their lives; that after the death of *Samuel*, the defendant *Mary*, and her husband, acted as executor; that all the debts and specific legacies had been paid. They admitted all the representative capacities and rights of the plaintiffs; that they have received 347 dollars, being the whole personal estate, except what may be due from those who are entitled to distributive shares; and that the debts so due ought to be deducted from their shares; that, as to the *real* estate of *W. F.*, all they know is, that among the papers delivered to them by the plaintiffs *Abraham* and *John*, executors of *Samuel Franklin*, deceased, there was a deed from *Peter Dubois* and others, to *W. F.*, dated *November*, 1772, for 12 lots of land, containing about 3,800 acres, on the south side of the *Mohawk*; another deed from the same persons to *W. F.*, for 4,400 acres, on the south side of the *Mohawk*; another deed from the same persons, except *Dubois*, dated 5th of *January*, 1775, for 14 lots in *Tryon* county, containing 4,600 acres; that considerable parts of these three tracts were sold and conveyed by *W. F.* in his lifetime, and that other parts thereof were disposed of by *Samuel Franklin*, the acting executor, in his lifetime, by deed, in fee, perpetual lease, or by contracts with allowance for

[* 9]

improvements; but how much had been sold they did not know, though they had diligently inquired, particularly of the plaintiffs *Abraham* and *John*, who had refused to give any information on the subject; that nearly the whole of these three tracts was covered with settlers claiming title to the lands occupied by them; that, in 1791 and 1795, what land remained unsold of these tracts, was offered for sale by *Samuel* and *John Franklin*, the executors, for 5,000 dollars, being the original price paid by *W. F.* That after the death of *Samuel Franklin*, these defendants endeavored to trace the title of *W. F.* to these lands, and found that he purchased them at auction; that no information could be obtained from the plaintiffs *Abraham* and *John*, executors of *S. F.*; that it could not be discovered that the grantors to *W. F.* had any title. That *W. F.*, or his executors, had no actual possession of the lands, which were settled, and various persons claiming them had been in possession, in some instances 25 years, in others above 20 years, before the sale by the defendants, and in other cases 19 or 20 years; and that, according to the belief of the defendants, a large portion of these tracts was lost to the estate by the adverse possession of the tenants and occupants; that such was the belief of the defendants at the time of the sale by them, and was now their belief; that the defendants also received from the executors of *Samuel Franklin*, a deed from *John Brandon* to *W. F.*, dated the 4th of July, 1771, for an island in *Lake George*, containing 100 acres; another deed from *Joseph Fairlie*, dated 4th of February, 1771, for 200 acres on a neck of land on *Lake George*. That if the title to these parcels were good, the land was poor, and not worth more than 300 dollars. That they know nothing of any land in **Queensberry*, in the county of *Washington*, belonging to the estate of *W. F.* That they received from the executors of *Samuel Franklin*, a deed to *W. F.* for 2,363 acres of land on the *Susquehannah*, in 12 lots, which land is rough, and of no great value, and some of the settlers claimed title by possession. That they also received from the executors of *Samuel Franklin*, deeds for lands in the state of *Vermont*, to *W. F.*, which they specified, in *Hillsborough*, *Reading*, and *Hilton*, being 11,000 acres in the whole; a deed for 9 rights in *Cavendish*, and a deed for 14 rights in *Draper*, in the same state. That several of the titles were under the state of *New-York*, and were lost when *Vermont* became an independent state; that a considerable part of the lands have been sold for taxes, or lost by adverse possession; and for these causes, according to the best information and belief of the defendants, the title to all the lands in *Vermont* of *W. F.*, has

1816.

OSGOOD
V.
FRANKLIN.

[* 10]

1816.

OSGOOD
v.
FRANKLIN.

[* 11]

become entirely lost and extinguished, excepting about 2,000 acres in *Cavendish*, which is mountainous, and of little value, and the settlers on which dispute the title of *W. F.* That to their knowledge, there are no other lands belonging to the estate of *W. F.*, and that they were satisfied there was no land of *W. F.* in the county of *Greene*; that they cannot describe the lands, or their value, more fully or accurately; and they set forth, in a schedule; all the deeds and papers received from the executors of *Samuel Franklin*, the 23d of *February*, 1808, for which they gave a receipt; and which were the only deeds or papers ever received by the defendants, relative to the real estate of *W. F.* That they never could obtain any information from the executors of *Samuel* and *John Franklin*, relative to the situation, quantity, or value of the said lands; that during a period of about 27 years, during which time the said *Samuel* and *John* jointly, and *Samuel* alone, as acting executors of *W. F.*, had the care of the estate, the lands were left exposed *to settlers and intruders, and were not taken possession of by any person in behalf of the estate; and the greater part was now claimed to be held by occupants, by adverse possession; that the lands are subject to the dower of the defendant *Mary Osgood*, and to the payment of quit-rents, large arrears of which were due. That, under all these difficulties and embarrassments, and as no part of the lands could be recovered without much litigation and expense, the defendants deemed it best for the estate, and for those interested, to sell the whole of the residue of the estate together, *en masse*; that in *June*, 1808, they agreed to sell to *Norton* and *Clinton* the whole of the said lands, for the sum of 25,000 dollars, and accordingly, on the 11th of *June*, 1808, executed a deed to *S. Norton* for two thirds, and to *Clinton* for one third thereof. That they were advised by counsel, that the defendant *Mary* had power to sell the real estate under the will of the testator; that, in their judgment and belief, the sum for which the lands were so sold to *N. and C.*, is their full value, and more than the defendants would have given for the same, under the circumstances stated. They fully and absolutely denied any collusion, corruption, or fraud whatever in the sale, or any secret trust, understanding, or agreement, relative to the same; and they claimed one eighth of the sum for which the said lands were sold. They further stated, that the plaintiffs, or either of them, before the sale, never applied to them to come to any settlement or distribution of the estate; nor had any, or either of the plaintiffs, since the sale, applied to the defendants to make void the same, and to have the property resold; nor had any of the plaintiffs

suggested or pretended to them, or either of them, that the price obtained for the land was not its full value. That they used all the means in their power to obtain correct information relative to the value of the lands, and as to the titles, &c., and believe that the price for which *the lands were sold was a full and adequate price for the same.

The answer of *De Witt Clinton*, filed September 26th, 1809, stated, that all the title deeds to the lands did not come into the hands of *Osgood* and *Mary* his wife; that the deeds from the original patentees to *Dubois* for the lands in *Cherry Valley* were supposed to be lost, and were recently discovered, by the defendant, to be in the hands of *W. North*, Esq. That in 1788, *Norton* proposed to become concerned in the purchase of the residuary estate of *W. F.* for 30,000 dollars, which he (*Clinton*) declined, thinking the price too high; that being informed, afterwards, that the purchase might be made for 25,000 dollars, he consented to be interested with *Norton*, and received a deed from *Osgood* and his wife for one third of the lands, dated June 11th, 1808; and a deed was given to *Norton* for two thirds of the lands, being all the lands of *W. F.* unsold in the *United States*, particularly in *New-York* and *Vermont*. That *Norton* made and completed the purchase. He denied all secret understanding, collusion, fraud, or unfairness between the parties in the transaction; and that he offered to give up the bargain, and *Osgood* refused. That a full price was given; and he believed that a higher price could not have been obtained. That the only tracts of much value lie in *Sharon*, in the county of *Schoharie*; in *Canajohary*, in *Montgomery* county; and in *Cherry Valley*, in *Otsego* county, being what are called the *Cherry Valley* lands. The first tract contained 3,800 acres, being in the patent to *P. Livingston* and others; the second, 4,400 acres; and the third, 4,600 acres; the two last tracts lying in *Young's* patent. That *Samuel Franklin* authorized settlers to occupy, and promised to pay for the improvements, which had greatly diminished the value of the lands to him and *Norton*. That most of the lands are held and claimed adversely to them, and they have been obliged to commence suits to recover *the possession of a great part of these lands, the result of which cannot be foreseen. That the county is considerably settled, but the lands are hilly and rough, and he cannot form a judgment of their real value. That the island and point of land in *Lake George* were worth one dollar per acre. That the 850 acres in *Queensberry* were on a perpetual lease, at one shilling per acre; and the value about 1,500 dollars. That there was a tract of 2,363 acres, conveyed by *Edward Dunscomb* to *W. F.*, the 22d September,

1816.

OSGOOD
V.
FRANKLIN.
[* 12]

[* 13]

1816.

OSGOOD
v.
FRANKLIN.

1771, lying in *Schoharie* and *Otsego* counties, but in what town he did not know, nor its value; but it was mountainous land, and the timber was, in a great measure, destroyed. That there was a tract of about 3,500 acres in *Greene* county, conveyed by *Ann Morris* and *Joseph Griswold* to *W. F.*, April 23d, 1774, but he did not know in what town it was situated. That *W. F.* had a claim in the *Waywayarda* patent in *Orange* county, but he understood and believed that the title was bad. That the titles to the lands in *Vermont* had been partly lost by the independence of that state, and part by sales for taxes, and to most of the lands there were claims of adverse possession, so that the whole was considered and believed to be of very little value. That he was advised by counsel that *Mary Osgood* had a good right of dower in all the real estate of which *W. F.*, her husband, died seised.

The answer of *John L. Norton* was substantially the same as that of *De Witt Clinton*.

Replications were filed to the issues and testimony taken in both causes, but chiefly in the cross cause, it being agreed that the depositions should be used in both.

The plaintiffs in the cross bill gave in evidence a release of *Mary Osgood*, dated May 11th, 1786, whereby she released to the executors of her husband, *W. F.*, deceased, all her right to dower in his estates, except such parts as were situate in the city of *New-York*, or on *Nassau Island*.

[* 14]

**W. T. Robinson*, in or about *December*, 1806, had a conversation with *De Witt Clinton*, about the lands belonging to the estate of *W. F.*, in which *Clinton* said they were worth about 100,000 dollars; and the witness, a few days after, mentioned what *Clinton* had said to *Samuel Osgood*. Another witness stated, that he was at *Cherry Valley* in *July*, 1808, and saw *Norton* there, who was then surveying the lands, and said, he would not take 26 dollars per acre, and that he should not be obliged to bring many ejectments. Seven or eight witnesses, being persons living near the *Cherry Valley* lands, deposed, that in their opinion those lands were worth from 10 to 15 dollars per acre, in the year 1808. It was testified, that some of the land lying on the turnpike road was sold by the agent of *C. and N.* in 1809 for 15 dollars. That in 1786, *Col. Corsa* left a paper in *Cherry Valley* relative to the lands of *W. F.* That many of the settlers were waiting to purchase, if they were satisfied as to the title of *C. and N.* Others refused to acknowledge any title in *W. F.* or *C. and N.* That in 1808, *C. and N.* said their title was good.

John Lawrence, a witness for the defendants, testified, that some years ago he passed through the lands in *Cherry*
16

Valley, and was at the house of one of the settlers, who said, they had gone on the land under some agreement with the executors of *W. F.*, but no title had been given to the settlers. That, afterwards, he was asked by *Samuel Osgood* what he would give for these lands, and whether he would give 25,000 dollars; and the witness said that, considering all circumstances, he would not give that sum in cash, for there might be trouble with the settlers.

Another witness testified, that in 1786, Col. *Isaac Corsa* was at *Cherry Valley*, and said, he was authorized to sell or lease the lands of *W. F.*; and left a paper containing the numbers of the lots and quantities, and inviting persons to settle on the lands; and that if the lands were sold to any other persons, the settlers should be paid for their improvements, the value thereof to be ascertained by two persons mutually chosen by the parties. The witness had lost the original paper, and had no copy. That 50 or 60 persons, in consequence, settled on the lands, in expectation that the terms of settlement so held out would be fulfilled, and they claimed compensation for their improvements. These terms were afterwards recognized in a letter of *Samuel Franklin*, written to some of the settlers, June 25th, 1791; and again, in November 27th, 1793. *John* and *Samuel Franklin* gave a writing to the same effect, saying, that the settlers should have a preference as purchasers, or lessees.

Samuel Campbell proved the agency of Col. *Corsa*, and the recognition of it by *Samuel Franklin*, the executor, who conveyed to the witness, in 1791, 150 acres, at two dollars per acre.

Jabez Hammond, who was agent for *C. and N.*, deposed, that in 1808, all the settlers, except a few individuals, refused to attorn to *C. and N.* Some of them denied the title of *C. and N.*, and others relied on their own adverse possession, and all refused to give up possession, unless paid for their improvements, according to the terms offered by *Corsa*. That several suits were brought, and were still pending. That some of the settlers sold their improvements for from nine to twelve dollars per acre; that the value of their improvements was, at least, one half the present value of the lands, and that under these embarrassments the value of the land was nominal only; that the timber had been much wasted; that the average value of the lands in June, 1808, was not more than two dollars and fifty cents per acre on an average. That the whole quantity of the *Cherry Valley* lands, claimed by *C. and N.*, was about 12,000 acres, besides four lots, which had been sold by *Samuel Hake*, and for which *C. and N.* had brought suits, which were still pending; that if these lots were included, the whole would

1816.

OSGOOD
v.
FRANKLIN.

[* 15]

1816.

Osgood
v.
FRANKLIN.

*be about 13,000 acres. *Calvin Rich*, a witness, residing on the land, was of opinion, that in *June*, 1808, the lands, free from all embarrassments, were worth 12 dollars per acre. He stated, that the tenants, generally, refused to acknowledge the title of *C. and N.*; that the timber had been wasted, and that the compensation claimed for improvements, in general, exceeded the price of the land.

S. Riker deposed, that in 1809, 19,000 acres of land lying in *Belvidere* patent, in *Otsego* county, had been sold at auction in the city of *New-York*, at two dollars and fifty cents per acre; and on being put up a second time, brought only two dollars per acre.

Two of the plaintiffs, in the cross cause, *Abraham and John Franklin*, having been discharged under the insolvent act, in 1811, and one of the plaintiffs having died, a bill of revivor and supplement was filed the 25th of *February*, 1812, making the assignees of the insolvents, and the executors of the deceased plaintiff, parties; the assignees appeared and submitted their rights to the Court, and the bill was *pro confesso*, against the others, and revived.

Afterwards, *Samuel Osgood*, one of the defendants to the cross bill, having died, in *August*, 1813, and *Sarah Corsa*, one of the plaintiffs, having also died intestate, a bill of revivor and supplement was filed the 27th *November*, 1813, and the suit was revived against *Mary Osgood*, as executrix of the last will of *Samuel Osgood*, and against the administrations of *Sarah Corsa*.

On the 4th of *October*, 1814, *Maria*, the wife of *De Witt Clinton*, and *Sarah*, the wife of *John L. Norton*, were, by order of the Court, made parties to the suit; and *Mary Osgood* having died on the 6th of *October*, 1814, a third bill of revivor and supplement was filed the 1st of *December*, 1814, in which it was stated, that *Mary Osgood*, by her will, dated 27th of *July*, 1814, after certain specific legacies, devised the residue of her estate, real and personal, to her children, against whom, and the executors of **Mary Osgood*, who were her son and two sons-in-law, the bill was revived, and they are the present plaintiffs in the first original cause; and, with *De Witt Clinton* and his wife, and *John L. Norton* and his wife, are the present defendants in the cross cause.

The last bill of revivor and supplement to the original cross bill stated, that *Clinton* and *Norton* had sold parts of the residuary estate of *W. F.*, purchased by them, for more than 110,000 dollars, which has been paid part in money, and part by bonds and mortgages; and that they still held a large and valuable part of that estate unsold. *C. and N.*, in their answer, admitted that they had sold part of the lands, and retained certain parts thereof, but not having received

any accounts from their agents, they could not speak with certainty as to the amount, but did not believe it was 110,000 dollars.

The several causes came on to be heard together, on the 29th of *September* last.

1816.

Osgood
v.
FRANKLIN.

Harison, Colden, Slosson, Bracket, and Clark, for the defendants in the original suit, and for the plaintiffs in the cross suit.

T. A. Emmet, contra, for *Clinton*, and the other defendants, in the cross suit.

Riggs, for the defendant *Norton*.

Wells, for the defendants *Norton* and *Clinton*.

Baldwin, for the defendant *Clinton*.

S. Jones, jun., for the representatives of *Mrs. Osgood*.

The different points raised, and authorities cited on the *argument, are so fully stated and examined by the Court, that it is unnecessary to give the arguments of the counsel.

[* 18]

The cause stood over for consideration until this day, *January 15th*, when the following opinion was delivered by the Court.

THE CHANCELLOR. The controversy between the parties arises in the cause which was commenced in 1809, between *Franklin and others against Osgood and others*. Two preliminary objections were raised by the counsel for the defendants.

1. That letters testamentary on the will of *Thomas Franklin* were taken out in *Pennsylvania*, and are of no force here.

2. That the assignees of *Abraham* and *John Franklin*, who are insolvent, ought to have been plaintiffs, instead of being defendants, as their interest, if any, is as plaintiffs; and that they cannot be made defendants, unless they had refused to be complainants, or were in collusion against them.

The production of a probate recently taken out in this state is a sufficient answer to the first objection; for it seems to be pretty well settled, that where no objection is raised by pleading, a probate taken out at any time before the hearing is sufficient, in this Court, to support the plaintiff's demand. (*Humphreys v. Humphreys*, 3 P. Wms. 351. *Fell*

A probate of a will taken out at any time before the hearing, is sufficient (when no objection has been taken by pleading) to support

1816.

Osgood
v.
FRANKLIN.

the plaintiff's
demand.

On a bill of
revivor, the as-
signees of a
[* 19]
party become
insolvent, can-
not be made
plaintiffs a-
gainst their con-
sent, and if they
refuse, they
may be made
defendants.

v. *Lutwidge*, 2 *Atk.* 120. *Patten v. Panton*, cited in *Bacon*, tit. *Exec. (E.)* pl. 14., edit. by *Gwillim*.) With respect to the second objection, the assignees could not be compelled to be plaintiffs; and it is admitted, that if they had not consented, they must have been made defendants. It is sufficient for the merits of the case that they are before the Court, and the objection goes only to a matter of form. But as the assignees have put in their answer as defendants, and have made no objection to that character, I would even infer their refusal to join as plaintiffs, if it were necessary, *in order to avoid any embarrassment from such an objection raised at the hearing.

1. The first question arising on the merits is, whether *Mary Osgood*, as sole surviving executor of *Walter Franklin*, deceased, was authorized to sell the real estate.

The part of the will of *Walter Franklin* relating to the question is as follows: "*The whole residue of my estate I give and bequeath as follows: one eighth to Sarah Corsa, &c.; one eighth to Mary Wistar, &c.; to my wife, one eighth, &c.; to my daughters, Maria and Sarah, each one eighth; to my brothers, John, Thomas, and Samuel, each one eighth, &c. And I order that the money or effects be distributed and divided from time to time, as it can be raised from my debts and estate by my executors, hereafter named, &c.; and they are to keep a sufficiency undivided, to pay off all legacies, and to keep the estate as much on interest or rents as they can for the general benefit. And I appoint my wife with my three brothers aforesaid to be executors, but on this condition, that if they owe me any money at my decease, their appointment, or acting as executors, shall not be a release of their debts, but the same shall be paid; and if they do not act on this condition, they are not to be executors. I give to my executors that (they) may act, and to the major part of them, their heirs or executors, full power to sell any or all my real estate not already devised, &c. I give to each of my executors who shall act, 200*l.* in lieu of all other commissions and rewards, &c.*"

If the case turned upon the dry question, whether by the common law a naked power without interest to executors to sell, would survive, I should deem the authority of Lord Coke decisive. He lays down the rule repeatedly in his *Institutes*, (*Co. Litt.* 112. b. 113. a. 181. b.) as one well established, that the power would not survive; and the same law was declared by *Dodderidge, J.*, the contemporary of Coke, and author of the *Touchstone*. (*Shep. Touch.* tit. *Testament.* pl. 9. p. 429.) These writers were, in their time, and have been in every period since, regarded as oracles of the common *law, and they must have been familiar with the old author-

A naked pow-
er to executors
to sell does not,
at common law,
survive.

[* 20]

20

ities. I do not, therefore, consider the observations of Mr. *Hargrave*, (*Co. Litt.* 113. a. note.) even after giving them all the weight justly due to his talents and learning, as being sufficient to overturn a rule so strongly established; and especially when it has been shown by Mr. *Powell*, (*Treatise on Devises*, p. 292—310.) that he is by no means borne out by the cases to which he refers. The statute of 21 Hen. VIII. c. 4. affords no small confirmation of the doctrine in *Coke*; for the preamble declares the opinion that a sale by executors under a power in a will "can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named to and for the same."

But while I thus acknowledge the rule of the common law, I am equally satisfied that this cause is not governed by it. In the first place, this case comes within the exception stated by Lord *Coke*; for here was an interest sufficient to feed the power, and keep it alive in the hands of the surviving executors. The executors were vested by the will with an absolute interest in an undivided moiety of the whole residuary estate, on which the power was to operate, and they were also directed to keep the whole of this residuary estate as much as possible on interest, or *rents*, for the general benefit. This authority to lease, and this interest in the subject itself, must be sufficient to exempt the power from the character of a mere naked authority to a stranger. It is not necessary that the interest coupled with the power should be a legal interest. An equitable estate is sufficient, and is regarded in this Court as the real interest. So it was held by Lord *Hardwicke*, in *Hearle v. Greenbank*; (3 *Atk.* 714.) nor does the character of the power depend upon the quantity of interest. A trustee invested only with the use and profits of the land for the benefit of another, has an interest connected with his power. This was so understood in *Bergen v. Bennett*, (1 *Caines's Cases in Error*, 16.) and in *Eyre v. Countess of Shaftsbury*, (2 *P. Wms.* 102.) a testamentary guardian, with authority to lease, was held to possess a power coupled with an interest, and capable of survivorship.

In the next place, here was a trust charged on the executors, in the direction given to them to distribute the proceeds of the residuary estate; and according to the settled doctrine of the Court, the trust does not become extinct by the death of one of the trustees. It will be continued in the survivor, and cannot be permitted, in any event, to fail of execution for want of a trustee. In this case, one of the trusts under the will depended upon a sale. In *Garfoot v. Garfoot*, (*M.* 15

1816.

OSGOOD
V.
FRANKLIN.

But if executors, having power to sell the real estate, are vested with any interest, legal or equitable, in the estate, the power survives.

[* 21]

So if the executors are charged with a trust, relative to the estate, and depending on the power to sell, the power survives.

1816.

Osgood
v.
FRANKLIN.

If residuary legatees might come in and take the land itself, instead of the proceeds, it is too late, after a sale by the executors, to [* 22] make their election.

In the construction of powers of sale, the intention of the testator is much regarded.

Car. II. 1. Ch. Cas. 35.) lands were devised to the wife for life, and then to be sold by the executors, for younger children's portions, and the wife and executors died, and the younger children exhibited their bill to compel the heir to sell; and on demurrer by the heir, on the ground that the executor had but an authority which died with him, the demurrer was overruled. So, also, in *Barnes's* case, (Sir *Wm. Jones*, 352. *Cro. Car.* 382. *S. C.*) lands were devised to the wife for life, and then to be sold by the executors for payment of debts and legacies, or as one of the reports of the case says, to be divided among the nephews. One of the executors died, and it was held, on a case sent from chancery for the opinion of the judges at law, that the survivor could sell, though the executors had an authority, and no interest. Whatever, therefore, might have been the character of the power in this case, the strict rule of the common law could never be permitted, in this Court, to defeat the trust connected with the execution of the power. Whether the residuary legatees might not have come in and taken the land itself, instead of the proceeds which the executors, as trustees, were to distribute, and thereby have arrested the execution of the power to sell, is a point not now before me. No such application was ever made; the power to sell was left by the legatees to its full operation; *and they come too late, after the sale, to make their election, or to raise such a question.

Either of these grounds appears to me to be sufficient to support the sale by Mrs. *Osgood*, as the sole surviving executor. There are other considerations, also, which add great weight to this conclusion.

The intention of the testator is much regarded in the construction of these powers, and they are construed with greater or less latitude in reference to that intent. It was evidently the testator's intention here, that the power should not fail as long as there was an executor to execute it, for the power is given even to the *major part* of the *acting* executors, and it was to descend to the legal representatives, both real and personal, of the executors. In other words, it was made transmissible by descent and by will; and though it is left doubtful as to the portion of the executors from whom that transmission was to proceed, I should take the better opinion to be, that it was to proceed, as in the case of other joint interests or trusts, from the *last survivor*, and that the testator could not have intended such incongruity and confusion as the union of the heirs and executors of a deceased executor with the surviving executors. The testator had also in contemplation the possible case of his wife acting alone; for he imposes a con-

dition upon the other executors, without complying with which they were not to be considered as appointed.

I am satisfied, for these reasons, that it would be repugnant to the intention of the will, to the rules of law, and to the principles of this Court, to defeat a power uniting so much trust, confidence, and interest, by applying to it the strict doctrine of the common law, relative to mere naked authorities.

2. The next point made on the part of the legatees is, that the sale was a fraudulent breach of trust, and ought either to be set aside, or, if permitted to stand, that the representatives of *Osgood and his wife* ought to account *for the real value of the lands at the time of the sale, instead of the price at which they were sold.

The ground relied on in support of the charge of fraud, is the inadequacy of the price. I have examined the authorities on this point, and I am satisfied that it is not, of itself, and ought not to be, a justifiable cause of interference, unless the inadequacy be so gross as to be evidence of actual fraud.

I see no just pretext for the charge, that the sale was not made by the executrix and her husband in good faith; nor do I think that, under the circumstances of this case, there was any such inadequacy of price as to give color to the inference of fraud.

There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression. And the inequality amounting to fraud, must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. (Sir *Th. Clarke*, in *How v. Weldon*, 2 *Vesey*, 516. Lord *Thurlow*, in 1 *Bro.* 9. Lord *Ch. B. Eyre*, in 2 *Bro.* 179, *note*. Lord *Eldon*, in 9 *Vesey*, 246. Sir *William Grant*, in 16 *Vesey*, 517.) There is a very important distinction, which runs through the cases, between ordering a contract to be rescinded, and decreeing a specific performance. Though inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded, (unless its grossness amount to fraud,) yet it may be sufficient for the Court to refuse to enforce performance. It is not an uncommon case for the Court to refuse to enforce for inadequacy, and at the same time refuse to rescind. The two cases admit of very different views and considerations. This whole subject was very fully discussed in *Mortlock v. Buller*, (10 *Ves.* 292.) which was the case of a bill for a specific performance of a contract of sale of land by the *defendant,

1816.

Osgood
v.
FRANKLIN.

[* 23]

Mere inadequacy of price is not sufficient ground for setting aside a sale, unless the inadequacy be so gross as to be, of itself, evidence of fraud.

But inadequacy of price, though not so gross as to amount to fraud, may be a sufficient ground for refusing to enforce a specific performance of a contract of sale.

[* 24]

1816.

OSGOOD
v.
FRANKLIN.

as agent of trustees. The land was sold in *September*, for £26,500, and in *December* following, the plaintiff had contracted for the resale of a part only for £34,900, and the trustees refused to ratify the sale. There was no imputation of fraud in the transaction. The character of the parties was unimpeached, and though the plaintiff had neglected no previous means of information as to the value of the land, yet the chancellor said he was at full liberty to do so, and might honestly contract with persons at arm's length, and dealing for themselves. But, he said, there was a want of care and attention on the part of the trustees, in not exerting a wise and full discretion as to a reasonable price, amounting to a breach of trust, and he thought himself not bound to afford relief to a purchaser who had contented himself with a contract, instead of a conveyance, and so dismissed the bill. There can be no doubt, from the language of the Court, that if the conveyance had been executed, it would have stood, notwithstanding the inadequacy. Thus, in *Day v. Newman*, cited in 10 *Vesey*, 300, Lord *Alvanley* refused to enforce a specific performance of an agreement for the sale, for £20,000, of an estate worth only £10,000. There was no actual fraud in the case, but the inadequacy was so great that he would not enforce the contract against the seller, nor, on the other hand, would he sustain a cross bill to rescind it.

I need not multiply cases on this point. The doctrine is settled, that in setting aside contracts, on account of inadequate consideration, the ground is fraud arising from gross inequality. Unless the inadequacy does, of itself, *ex evidentiâ rerum*, prove fraud, the rule is, says Ch. B. *Macdonald*, (1 *Wightwick*, 109.) that inadequacy, by itself, has not the weight suggested. If, indeed, advantage be taken, on either side, of the ignorance or distress of the other, it affords a new and distinct ground, not applicable to this case, and a very great inadequacy may form a presumption *of oppression. (1 *Wightwick's Rep.* 28, 29. 3 *Ves. & B.* 117.) Dealing with young heirs, and for reversionary interests, is also watched with the utmost jealousy, and constitutes a particular class of cases, forming another exception to the general rule, that for mere inadequacy of price a contract is not to be set aside. (*Evans v. Peacock*, 16 *Vesey*, 512. *Gowland v. De Faria*, 17 *Vesey*, 20.) So, leases of charity estates will be set aside for an undervalue, if considerable, though there be no imputation of fraud, on grounds peculiar to that trust. (18 *Vesey*, 315.) But none of those exceptions to the general rule apply to this case. Here is no imputation on the character of the parties, and there is no appearance of undue means or influence, or of the practice of

[* 25]

any kind of imposition. The most that can be said is, that the property would have been vastly more productive, if the executor had taken more pains to ascertain the title, and had made the sales in small parcels, and to settlers upon credit. As the property was situated at the time of the sale, I do not believe, from any proof in the case, that the land could have been sold at that time, in one entire parcel, at a better price. The testimony of *John Lawrence*, and of *Samuel Riker, jun.*, serve to confirm me in this opinion. The land at that time was, in general, heavily encumbered with adverse claims and pretensions. The former acting executors, who were then dead, and whose representatives are among those who are now seeking to impeach the sale, had suffered all this residuary estate to lie unregarded for upwards of twenty years, and adverse possessions were fast closing upon the *Franklin* title. These possessions (I speak now of the *Cherry Valley* lands, and which, indeed, are the only lands of much moment in the case) were generally held under a contract made in 1786, by Col. *Corsa*, as assumed agent of the executors, and whose agency and contract the executors, or one of them, had ratified. By this contract, the settlers were to be paid *for their improvements, if they did not purchase. This claim was a great encumbrance on the title. It is well known, that improvements made by settlers are generally valued quite high; and it is in proof in this case, that such claims exceed, in many instances, the value of the land at the time the settlement was made. I do not perceive, from my present view of the claim under Col. *Corsa*, as shown by proof here, but that it might have been established in equity, if the application had been made in time. There were likewise defects in the chain of title, which had excited a general distrust of its validity; and this title was not made complete until the discovery of the release of the original patentees to *Dubois*, some time after the sale in question. It was found in the possession of *William North*; and as the former executors knew nothing of this paper, Mrs. *Osgood* had good reason to presume that it was irretrievably lost. There is no doubt this estate has suffered greatly by negligence, but it was a negligence of 20 years' standing, imputable, in a great degree, to the two former executors, who had the sole management of the trust.

These difficulties, in the way of title, have been justly and strongly urged, to show that the price is not to be charged with inadequacy, under all the circumstances of the case. Lands in such a situation have no determinate value, and they are not to be estimated by the price of improved farms, or lots which have a clear title, and may yield a known and steady rent. Accidental subsequent advantage made of a

1816.

OSGOOD
V.
FRANKLIN.

[* 26]

1816.

OSGOOD
V.
FRANKLIN.

[* 27]

bargain, is nothing, according to Lord Eldon. (*Coles v. Trecothick*, 9 Vesey, 246.) If we were to take such a ground, every transaction of this kind would come into a Court of equity. The purchasers in this case immediately bestowed the utmost diligence to assert their title and recover the lands, and by the fortunate discovery of title deeds, and by still more fortunate suits and negotiations, they must have been able to avoid the statute of limitations, and to escape the embarrassment of the claim for improvements, and have *turned their speculation to great advantage. I see nothing unusual in this, nor any thing censurable on the part of the purchasers; and the suit as against them ought to be dismissed, with costs.

A trustee is not chargeable with imaginary values, or more than he has received, unless there is evidence of gross negligence, amounting to wilful default.

I have confined my attention solely to the circumstance of inadequacy of price, because no other was stated or urged by the counsel, and no other has occurred to me, as evidence of fraud. The only question of any serious doubt in the whole case, is, whether there was not a want of attention and vigilance on the part of Mrs. Osgood, amounting to a breach of trust, so as to render her representatives chargeable beyond the moneys actually received. I think, upon the whole, this would be too rigorous a conclusion. A Court of equity, according to the lord keeper, in *Palmer v. Jones*, (1 Vern. 144.) never charges a trustee with imaginary values, or with more than he has received, unless the proof be very strong of supine negligence. Lord Thurlow said, it must amount to a case of wilful default. (1 Vesey, jun. 193.) Mrs. Osgood had an interest of one eighth in this residuary estate, and though the sale was to her two sons-in-law, yet she had children living by her second husband, Mr. Osgood; and she and her husband never could have made an intentional sacrifice of that estate, because it would have been sacrificing their own interest, and that of their other children. In that sale, then, it may be said, they took the same care of the interest of others as of their own. There were many considerations that might have had a rational and powerful influence on the minds of Mr. and Mrs. Osgood. This estate had been for more than twenty years under the sole care and management of the other executors, who were equally legatees, and who had suffered the estate to fall into ruin. The title was handed over to Mrs. Osgood in an embarrassed and doubtful state, and a very considerable part of the claim under the testator was null and void. This was the case with the *Wawayanda* claim, and *with the lands in *Greene* county, and most of the lands in *Vermont*. The only valuable property was the *Cherry Valley* lands, and they were covered with adverse possessions, and with settlers, under burdensome claims for improvements. What was the executor to do?

[* 28]

To undertake to recover these lands might lead to great expense, which would eat up the value of the estate. They aver, in their answer, that they deemed it best for the interest of the legatees, to sell, at once, the whole estate for the best price that could be obtained; and there is no reason to doubt the sincerity of this allegation. Whether that was or was not the most advisable course, under the then existing circumstances, was a difficult question, on which intelligent and prudent men might differ. I do not think that I am bound, by any principles in this Court, to deal so hardly with *Osgood* and his wife, as to make either of them responsible, as trustees, for an error of judgment, and I shall, therefore, not hold them answerable beyond the amount of the sale.

In arriving at this conclusion, I have been much governed by a view of the peculiar situation of the property when the trust was assumed by Mrs. *Osgood*, and of the desperate condition to which it was reduced by the folly and negligence of the former executors, and the tacit acquiescence of all parties in interest. The case would have been very different if she had been an acting executrix from the beginning. To exact of her a responsibility for the defaults of others, would be unjust. When she assumed the trust, in 1807, she was under the necessity of commencing, at once, a series of extraordinary efforts, and of expensive litigation, sufficient to strike ordinary minds with dismay, or of closing the concern of the administration of the estate by bringing the whole interest to market. There was no time for delay. One course or the other must have been pursued immediately, or the property abandoned forever. If she did not elect the most judicious course for the interest of the trust, she elected the other, with the best advice of her husband, and in perfect good faith. Of this there is no doubt. I cannot but think that the charge of an abuse of discretion does not come with great weight or equity from *cestui que trusts*, who are partly representatives of the former trustees, all of whom have been silent spectators of the manner in which the former trustees had conducted.

I shall, accordingly, decree, that the bill against the purchasers be dismissed with costs, and that the usual reference be made to a master to take and state an account between the representatives of Mr. and Mrs. *Osgood*, as executrix, on the one part, and the respective claimants of the residuary estate of *W. Franklin*, deceased, on the other: in taking which account, the estate of Mrs. *Osgood* is to be charged with the actual amount of sales and other moneys received, and no more, and the executors of *John, Thomas, and Samuel Franklin*, deceased, to be charged with the debts due from

1816.

OSGOOD
V.
FRANKLIN.

[* 29]

1816.

HOLDRIDGE
v.
GILLESPIE.

their testators respectively, to the estate of *Walter Franklin*, deceased; and the question of costs, and all other questions, to be, in the mean time, reserved.

Decree accordingly. (a)

(a) This decree was affirmed by the Court of Errors, on appeal, the 8th of April, 1817.

[* 30]

*HOLDRIDGE *against* T. and T. B. GILLESPIE.

If a mortgagee, executor, trustee, tenant for life, &c., having a limited interest, gets any advantage by being in possession, or otherwise, in obtaining a new lease, he is not allowed to retain it for his own benefit, but must hold it for the mortgagor, or *cestui que trust*.

Where the plaintiff assigned the lease of a farm to secure the payment of a debt due to the defendant; and the parties, afterwards, entered into an agreement, by which the plaintiff, in consideration of a sum of money expressed, but not, in fact, paid, agreed to give up to the defendant one half of the farm, and the defendant entered into possession of the premises, and surrendered the lease to the landlord, and took a new lease for an extended term of years; it was held that the plaintiff was entitled to redeem the whole premises, and, on such redemption, to have the entire benefit of the new lease.

Nov. 11th, 1815,
and
Jan. 15th, 1816.

THE plaintiff, being possessed of a lease from *B. W.* and others, of a farm of about 309 acres, (parts of lots 8, 9, and 10, in *Crosby's* manor,) dated in *November*, 1806, for eleven years, subject to an annual rent of 75 dollars, on the 26th of *May*, 1808, assigned the lease to the defendant *Thomas Gillespie*. The assignment was absolute; but the assignee, at the same time, executed a defeasance, declaring that the assignment was made to secure a debt of 74 dollars and 12 cents, due from the plaintiff to *Thomas Gillespie*, with interest. Part of the land was cultivated and improved. In *April*, 1809, the defendant *T. G.* took possession of the improved part of the farm. On the 29th of *August*, 1809, the plaintiff and defendants entered into an agreement, under seal, by which the plaintiff acknowledged that he had received of the defendants 100 dollars, as a compensation for one half of his improvements on the lot, and he gave up one half of the premises to the defendant *T. G.*; and, to secure to *T. G.* 75 dollars, with interest, together with what might afterwards become due to the defendants, the plaintiff gave up the lease to *T. G.* until the 75 dollars and interest, and moneys to become due, should be paid, *and *T. G.* engaged

[* 31]

to give the plaintiff a good lease for half the farm for eight years from the 1st of *February*, 1808, subject to the rents, &c.

The plaintiff averred in his bill, that the 100 dollars was to be paid by the defendants to the lessors for rent; that after the first agreement he delivered *T. B. G.* produce of the farm to the amount of 300 dollars, and performed work and services to the amount of 150 dollars; that *T. G.* went into possession of part, and the defendants had received the profits for 4 years, at the rate of 180 dollars a year; and that a balance was due to him from the defendants; that the defendant *T. G.*, after the first assignment, applied to the lessors, and surrendered up the lease to them, and took a new lease in his own name, and assigned it over to *T. B. G.* The bill prayed for an injunction against an ejectment brought by the defendants, in 1814, to recover possession of part of the premises occupied by the plaintiff, &c.

The defendants admitted that no money was paid to the plaintiff, but that the 100 dollars previously paid by them for rent to the landlords, and for 28 dollars and 34 cents, paid for a debt of the plaintiff, were agreed to be the consideration of the agreement of the 29th of *August*, 1809. That the defendants had previously paid the landlords the 100 dollars, but no acquittance or receipt was given to the plaintiff for the amount. That the defendant *T. G.* had been in possession since 1809, and made improvements, which were specified; had paid the rent and taxes for the whole farm for the last three years, and that the plaintiff had paid only one third of the rent for the year 1809. That the plaintiff had never paid the 75 dollars, or interest, and that he owed the defendant *T. G.* about 175 dollars, &c.; that the defendant occupied a small house and garden, and that the ejectment was brought for the house so occupied by the defendant *T. G.*, but not for the cleared land.

**Gold*, for the plaintiff, contended, that the plaintiff was entitled to redeem the whole of the demised premises, and to have the benefit of the new lease. Where the contract commenced in a loan, and the original transaction is to create a security for money, no collateral or subsequent agreement can change the nature of the contract, or deprive the mortgagor of the right of redemption.† A second conveyance, which springs out of, or is connected with a prior mortgage, partakes of its redeemable quality.‡ Though the renewal of the lease be on terms personal to the mortgagee, yet the renewed term is subject to the equity of redemption of the mortgagor of the old lease.§

Again; where the stipulation for redemption is contained in a distinct instrument, the Court will adhere to it strictly,

1816.

HOLDRIDGE
V.
GILLESPIE.

[* 32]

Nov. 11, 1815.

† 12 *Vesey*, jun.
234. *Powel on*
Mort. 19.

‡ 1 *Vernon*, 488.
2 *Caines's Cus*
in Error, 140,
Bloodgood v.
Zeily.

§ 1 *Vernon*, 84.
2 *P. Wms.* 512.

1816.

HOLRIDGE

v.

GILLESPIE.

† *Baker v.*
Wind, 1 Vesey,
160.‡ *2 Vesey, jun.*
84.§ *Frear v.*
Hardenburgh,
5 Johns. Rep.
272.

to prevent the equity of redemption from being entangled to the prejudice of the mortgagor.† And if a mortgagee has continued to treat the conveyance as a mortgage, it will be redeemable.‡

Again; nothing passed by the agreement of the 29th of August, 1809; for the term *improvements* imports no interest in land.§ Besides, the conduct of the defendant was unconscionable and oppressive.

Kirkland, contra, insisted, that there was no fraud or misrepresentation on the part of the defendant, in regard to the agreement of August 29, 1809. The consideration is for 100 dollars, received previous to the date. Though the agreement is not drawn with technical accuracy, yet the intention of the parties is sufficiently clear; that there should be a sale of one half, and the residue remain subject to redemption, on payment of 75 dollars, and the other responsibilities of the defendants. By the word "improvements," the land was evidently intended.

The authorities cited by the plaintiff's counsel are not denied; but the law which they are intended to support *is not applicable to the present case. The consideration was not a loan, but a debt; and the second conveyance did not grow out of the first, nor is there any stipulation for a redemption; nor is there any evidence that the parties treated the part sold as if mortgaged. The acts or declarations of the defendants are to be understood in reference to that part only of the land to which the plaintiff was entitled by the contract; and the plaintiff's own acts support this construction.

The case of *Frear v. Hardenburgh* was that of a contract to pay for labor in making improvements on land, not for the sale of improvements.

January 15th.

THE CHANCELLOR. The bill filed by the plaintiff is in the nature of a bill to redeem, and the plaintiff is entitled to redeem *the whole* of the premises contained in the lease, and to have the *entire* advantage of the new lease, on such redemption. The renewed lease enures for the benefit of the mortgagor. According to the cases of *Manlove v. Bale*, and of *Rakestraw v. Brewer*, (2 *Vern.* 84. 2 *P. Wms.* 511.) the additional term comes from the same old root, and is subject to the same equity of redemption, otherwise hardship and oppression might be practised upon the mortgagor. It is analogous, in principle, to the case of a trustee holding a lease for the benefit of the *cestui que trust*. Courts of equity have said, that if he makes use of the influence which his situation enables him to exercise, to get

[* 33]

a new lease, he shall hold it for the benefit of the *cestui que trust*. (1 *Dow.* 269. 1 *Ch. Cas.* 191. 1 *Bro. Ch. Cas.* 198.) So, if a guardian takes a renewed lease for lives, the trust follows the actual interest of the infant, and goes to his heirs, or executor, as the case may be. (18 *Vesey*, 274.) Indeed, it is a general principle, pervading the cases, that if a mortgagee, executor, trustee, tenant for life, &c., who have a limited interest, gets an advantage by being in possession, "or behind the back" of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust. (Lord *Manners*, in 1 *Ball & Beatty*, 46, 47. 2 *Ball & Beatty*, 290. 298.) The doctrine has been uniform from the decision of Lord Keeper *Bridgman*, above referred to, in 1 *Ch. Cas.* 191., down to the most recent decisions. Nor do I think that the agreement of *August*, 1809, ought to form an obstacle to the redemption of the whole. That agreement bears the mark of undue influence growing out of the first assignment; and contracts of that kind, made with the mortgagor, to lessen or embarrass the right of redemption, are regarded with jealousy, as they are very apt to take their rise in unconscientious advantages assumed over the necessities of the mortgagor. (1 *Vern.* 8. 2 *Vern.* 520. 2 *Atk.* 495. 2 *Ball & Beatty*, 278.) The general principle is, "once a mortgage, always a mortgage;" and though, no doubt, the equity of redemption may be released upon fair terms, yet the fairness and value must distinctly appear. In this case, there was no satisfactory consideration for an abandonment by the plaintiff of one half of his farm. The agreement was false on its face, for the consideration was not paid. A payment of the annual rent to the landlord, was no compensation to the plaintiff for half of his farm; and if we can credit the subsequent declarations of the defendants, they regarded the *whole* farm as still subject to redemption. But without placing reliance on sayings of this kind, the paper itself, accompanied with the admission that the consideration was never paid to the plaintiff, is enough to justify me in not regarding that agreement as a valid obstacle to the original right of redemption.

I shall, therefore, direct a reference to a master to take and state an account between the parties, in which the plaintiff is to be charged with the 74 dollars and 12 cents, mentioned in the original defeasance, with interest from that time, and is, likewise, to be charged with all sums of money justly due to the defendants for goods sold, or advances *by them, or either of them, made to and for his use, and on his account; and that the plaintiff is to be credited with all payments made, or articles of produce delivered,

1816.

HOLDRIDGE
V.
GILLESPIE.

[* 34]

[* 35]

1816.

HOLDRIDGE
V.
GILLESPIE.

or work, labor, and services, rendered to the defendants, or either of them; and that the defendants are to be charged with the net yearly value of the premises possessed by them, or either of them, during the time of their possession, after deducting the rent and taxes accruing and paid during that period; and that the pleadings and proofs taken in the cause (the deposition of *John Connolly*, (a) excepted,) be received as evidence before the master, and that the question of costs, and all other questions, be reserved, until the coming in of the report.

Decree accordingly.

(a) An objection was made to his deposition being read, on the ground, that having been convicted of a statute perjury, though pardoned by the governor, his competency as a witness was not restored; (2 *Salk.* 689. *Peake's Evi.* 127. *Phillips's Law of Evi.* 28;) the statute having made the total disability to become a witness, a part of the punishment until the conviction is reversed. (1 *N. R. L.* 171. sess. 24. ch. 74. s. 1.)

32

1816.


 HILDRETH
V.
SANDS.
HILDRETH *against* SANDS and others.

A deed fraudulent on the part of the grantor, may be set aside, though the grantee is a *bona fide* purchaser, and ignorant of the fraud.

But the fraud of the grantor must be clearly established by proof. The mere fact, that the grantor has suffered the bill to be taken, as against him, *pro confesso*, is not sufficient.

Fraud may be inferred from circumstances, such as the smallness of the consideration expressed, compared with the fair price of the property conveyed; the want of proof of any price having been actually paid; the grantor continuing in possession or exercising acts of ownership; or circumstances attending the delivery and execution of the deed, &c.

*A deed brought forward as founded on a valuable consideration, cannot be set up as a gift or voluntary conveyance, but the party is bound by the consideration alleged.

[* 36]

A deed not fraudulent at first, may become so afterwards, by being concealed or not pursued, by which means creditors have been drawn in to lend their money.

A purchaser at a sheriff's sale under the judgment of a creditor, is entitled to the benefit of the statute of frauds, equally as the creditor himself.

THE bill was filed, in this case, to set aside a conveyance made by the defendant *Comfort Sands*, to the defendant *Robert Sands*, of certain lands in *Brooklyn*, on which a ropewalk is situated, as fraudulent against the plaintiff, who purchased the same at a sheriff's sale, under an execution against *Comfort Sands*. *Amie I. Barbarine*, the other defendant, was a tenant in possession, nominally, it was said, under *Robert Sands*.

Nov. 14th and
15th, 1815, and
Jan. 15th, 1816.

The bill was taken *pro confesso* against *Comfort Sands*, for want of an answer. *Robert Sands* put in his answer; and, as it regarded *Barbarine*, the case came on upon bill and answer, he having been examined as a witness on the part of the plaintiff.

In *March*, 1801, *Comfort Sands* was declared a bankrupt, under the then existing law of the *United States*, and finally obtained his certificate of discharge. The bill charged that *Comfort Sands*, previous to his bankruptcy, made sundry fraudulent conveyances of his real estate, to his sons *Henry* and *Lewis*, and to others; that *Isaac Kibbe*, the assignee of the bankrupt, refused to take measures, or to allow the creditors to institute a suit in his name, to set aside those conveyances. That *George Codwise* and others, creditors of the bankrupt, in *November*, 1801, filed their bill in this Court against *Comfort Sands*, and *Henry* and *Lewis Sands* and others, to set aside those conveyances, and a final decree was obtained against *Comfort Sands*, for 125

1816.

HILDRETH
v.
SANDS.

[* 37]

dollars and 65 cents costs, against *Comfort Sands*, and *Henry Sands*, for 1,402 dollars and 50 cents for *mesne* profits of the estate, and against *Comfort Sands* and others, defendants, for 1,300 dollars, costs of suit, for all which *sums *Codwise* and others became entitled to executions. That in *January*, 1805, pending the suit of *Codwise*, *Comfort Sands* purchased at a master's sale, under the mortgage given to the *Bank of New-York*, the real estate now in question, for the consideration of 500 dollars; but in consequence of the pendency of the suit against him, the master, by his direction, conveyed the property to *Joseph Sands*, who held the same in trust, for some time, and afterwards, before *July*, 1811, conveyed the same to *Comfort Sands*. That *Comfort Sands* remained in possession and erected a ropewalk thereon, which he paid for out of the rents and profits, and continued in possession until he fraudulently conveyed the same to *Robert Sands*; that the conveyance to *Robert Sands* was made in *February*, 1807, while the suit of *Codwise* and others was in rigorous prosecution, for a nominal consideration, and with a view to delay and defraud *Codwise* and other creditors. That *Robert Sands* did not take possession of the premises, nor receive the rents and profits; but permitted *Comfort Sands* to receive them, and who made improvements on the property at his own expense, or out of the rents and profits. That the deed was not delivered on the day of its date, nor until about the time the plaintiff's title was set up; and that the consideration expressed was not one third of the value of the property.

The property was sold by the sheriff, on the 3d *December*, 1811, under two executions, one out of this Court at the suit of *Codwise* and others, and the other out of the Supreme Court, at the suit of *E. Whitney*; and the plaintiff, who became the purchaser at such sale, for 215 dollars, received a deed from the sheriff, dated the 14th of *January*, 1812, conveying all the right of *C. S.* to the premises on the 13th *February*, 1808. *Barbarine*, the defendant, was in possession at the time, as a tenant for years, and refused to attorn to the plaintiff. The bill prayed that the deed from *C. S.* to *R. S.* might be declared fraudulent and void, *and be cancelled, or that if any thing was due to *R. S.* from *C. S.* at the time the deed was given, and for which it ought to stand as security, that upon payment thereof *R. S.* might be decreed to convey the premises to the plaintiff, and that *R. S.* and *Barbarine* might account to the plaintiff for the rents and profits, since the sheriff's sale, &c.

Robert Sands, in his answer, admitted the bankruptcy of *C. S.*, but denied all knowledge of any fraudulent convey-

[* 38]

ances by him; he knew of the pendency of the suit of *Codwise* and others, but was ignorant of the proceedings in it. He admitted that *Joseph Sands* conveyed the premises in *September*, 1806, but said, that he was ignorant of the purchase at the master's sale; that *C. S.*, in 1806 and 1807, built a ropewalk and store on the land, which he paid for partly in money, and partly from rents and profits received by him; and *C. S.* stated the cost to be 3,821 dollars and 94 cents. That the defendant *R. S.*, on or about the 21st *February*, 1807, purchased the premises for 4,500 dollars, which, he said, was the value of the property, and that the deed was acknowledged by *C. S.* and his wife, on the day of its date. That *C. S.* was then, and had been a long time, in possession of the premises; that if he had any fraudulent intention, it was unknown to the defendant; that at the time of the purchase, *C. S.* was indebted to the defendant 500 dollars, which, it was agreed, should be deducted from the consideration, and that the residue, being 4,000 dollars, should be paid as *C. S.* should require, either in cash, or by assuming debts of *C. S.*; that he afterwards paid, at different times, cash to the amount of 1,052 dollars, and assumed the payment of certain debts of *C. S.*, amounting to 2,948 dollars, a schedule of which he annexed. That there were no *liens* on the property; that he purchased it with a view to secure the debt of 500 dollars, which accrued in *December*, 1805, and to assist *C. S.* in paying several small debts; that in *October*, 1810, a settlement took place, as to the various sums paid, and making up the consideration *money, amounting to 4,500 dollars. That he took no receipts for the money, but kept a memorandum thereof, and relied on an adjustment of the amount between them; that his assumption to pay the debts of *C. S.* was in *September*, 1810, by writing at the bottom of a list of the debts presented to him by *C. S.* He never made any promise to the creditors, but only to *C. S.* that he would assume and pay the 2948 dollars; two of the debts he had before promised to pay in 1809; and that he paid a debt of *Sands* and *Crump* of 270 dollars, in *August*, 1809, and 100 dollars to *John R. Sands*, 1809; and in *May*, 1812, he paid a debt to *Joseph Mead*, of 76 dollars and 21 cents; that *Barbarine* was directed to pay 153 dollars and 42 cents, of those debts; that in *May*, 1812, he delivered *C. S.* 675 dollars; and in *September*, 1812, 474 dollars and 50 cents, to be applied to pay the debts; but whether these sums were so applied the defendant did not know; that he had not paid any of the creditors, except *Sands* and *Crump*, *John R. Sands*, and *Joseph Mead*. That on the 10th of *March*, 1811, he came to a settlement with *Barbarine* as to the

1816.

HILBRETH
V.
SANDS.

[* 39]

1816.

HILDRETH
v.
SANDS.

[* 40]

rent accrued on the lease to his partner, *John Smith*, of the 10th of *February*, 1807, and the money which *C. S.* had received in advance, and as to certain claims of the lessee against the lessor, and that a balance was found due to *Barbarine* of 1592 dollars and 33 cents, beyond the rent due; that the old lease was surrendered, and he gave *B.* a new lease for 7 years, from the 1st of *May*, 1811, at the annual rent of 692 dollars and 50 cents, and agreed that *B.* should retain 58 dollars and 85 cents, out of each quarter's rent, until he was repaid the 1592 dollars and 33 cents, so as to leave a clear annual rent of 465 dollars and 50 cents. That this settlement with *B.* was effected by *C. S.* as agent for, and at the request of, the defendant. That from the date of his deed in *February*, 1807, he had been the owner, and in actual possession of the vacant half of the premises, and *Barbarine* was in possession of the other half as his tenant. That *C. S.* superintended the building the ropewalk on the premises leased to *Smith*, between *February* and *May*, 1807; that when he assumed to pay the debts of *C. S.*, in 1810, he understood they were just debts, and some of them to be for the expenses of building the ropewalk; and that all the improvements between *February* and *May*, 1807, were made at the expense of *C. S.* That the deed, about the time of its date, was delivered to *John R. Sands*, son of *C. S.*, as agent of the defendant, (*R. S.*) and has remained in his possession, or under the control of the defendant, and not under the power or control of *C. S.* That *John R. Sands* had no special authority from him to receive the deed, but acted as his general agent; and he did not receive from him any immediate notice of the delivery of the deed; and that the terms of purchase, and manner of paying for the property, were agreed upon between him and *C. S.* before the delivery of the deed.

Barbarine, who, by an order of the Court, was examined as a witness, said, the property claimed by *Robert Sands* was worth between 6000 and 7000 dollars; that he became a tenant in possession, in *August*, 1807, in connection with *Smith*, who had a lease for 7 years, from *May* 1, 1807, from *C. S.*, and that he considered himself as a tenant of *C. S.* until *October* or *November*, 1810; that the first time he heard of the deed was in the summer of 1809, when it was mentioned to him by *Lewis Sands*, a son of *C. S.*, as a secret. That in *October* or *November*, 1810, *C. S.* first mentioned the deed to him. That in 1807, *Smith* paid *C. S.* the rent in advance for 1807, 1808, and 1809, and a part of 1810, amounting to 2562 dollars and 14 cents, which was endorsed on the lease; that in the spring of 1811, he settled with *C. S.*, who represented himself as the

agent of *Robert Sands*; and the witness did not see or converse with *R. S.* on the subject. The new lease, which was in the handwriting of *C. S.*, was first executed by *B.*, and sent into the country to be executed by *R. S.* That in *March*, 1811, he made his note for 500 dollars, payable to *R. S.* or order, on the 1st of *July*, which he paid to *C. S.*, and for rent from *May*, 1811, to *February*, 1812, he gave his note for 347 dollars and 50 cents, payable on the 1st of *November*, 1811, to *R.* or order, which was paid to *C. S.* Since *February*, 1812, he has paid no rent, because forbidden by the plaintiff. That *C. S.* sent to the witness a receipt for two quarters' rent, which would be due in *August*, 1812, with a list of debts due by *C. S.*, requesting the witness, out of the two quarters' rent, to pay those debts for him, *C. S.*; but the witness declined paying the debts. These debts were mentioned in the schedule referred to in the answer of *R. S.*

It appeared that *Isaac Heyer*, on the 21st of *January*, 1807, commenced a suit in the Supreme Court against *C. S.*, to recover 1510 dollars, and that he prosecuted the same to judgment, and that *C. S.* was also indebted to *A. Gracie* 984 dollars and 25 cents, which remained unpaid.

The cause came on to be heard the 14th of *November* last.

Riggs, for the plaintiff.

Woodworth, for the defendant.

The cause having stood over for decision, the following *January* 15th opinion was this day delivered by

THE CHANCELLOR. The bill is to set aside, as fraudulent, a deed of lands, at *Brooklyn*, from *Comfort Sands* to his brother, *Robert Sands*, of the date of the 21st of *February*, 1807. The plaintiff claims those lands as a purchaser, on executions under a judgment, and under a decree against *Comfort Sands*, of a date subsequent to that of the deed.

*The defendant, *Comfort Sands*, though charged with fraud in making the deed, has declined answering the charge, and has suffered the bill to be taken *pro confesso*. But the defendant *Robert Sands* has come in and denied the fraud, and claims to be an innocent and *bona fide* purchaser for a valuable consideration.

If the deed is admitted to be fraudulent on the part of *Comfort Sands*, the grantor, there would be difficulty in allowing the deed to stand, even if the grantee was, as he alleges, innocent of the fraud. It was observed, in a late case

1816.

HILDRETH

V.
SANDS.

[* 41]

[* 42]

1816.

HILDRETH
v.
SANDS.

A deed, fraudulent on the part of the grantor, may be avoided, though the grantee be a bona fide purchaser, and ignorant of the fraud.

in *Vesey*, (*Huguenin v. Basely*, 14 *Vesey*, 289, 290.) that interests obtained through the fraud of another person cannot be maintained; and the case of *Bridgman v. Green* (5 *Vesey*, 627. *Wilmot's Opinions*, 58.) is an express authority that interests so gained can be set aside. Lord *Hardwicke* observed, in that case, that if a person could get out of the reach of the doctrines of the Court by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud. When the same case came before Lord Ch. J. *Wilmot*, as commissioner, he held the same language. This was also the doctrine of Lord Chancellor *Thurlow*, who held it to be against conscience, that one person should hold a benefit which he derived through the fraud of another.

In a recent case in the house of lords, (1 *Dow's Rep.* 30.) Lord *Redesdale* very much doubted whether a purchaser for valuable consideration, even under a decree fraudulently obtained, though ignorant of the fraud, could protect himself.

The principle advanced by these high authorities is by no means new or uncommon. It has been laid down in the books, at different and distant periods, (*Bennet v. Wade*, *Dick. Rep.* 84. *Davidson v. Russell*, *Dick. Rep.* 761.) that fraud vitiates a deed *in toto*, though persons no way privy to fraud are beneficially interested in such deed. The words of *Dodderidge, J.*, in *Shepherd's Touchstone*, (p. 66. *67.) are to the same effect. "Albeit," he says, "those to whom a deed of fraud is made knew nothing of the fraud, yet is the deed fraudulent in that case also, as well as where they are privy to it."

[* 43]

But the fraud of the grantor must be established by proof. The mere fact of his suffering the bill to be taken *pro confesso*, is not sufficient.

These cases, however, all proceed on the ground that the fraud of the grantor is clearly established. In the present case it would be too rigorous to deprive the grantee of his deed, however innocent he might be, upon the mere fact that the grantor suffered the bill to be taken *pro confesso*. This might happen from collusion with the plaintiff, or from ill will to the grantee; and though no such motive is to be suspected in this case, yet before the above principle is to be applied, I should say there ought to be more evidence of the fraud than the mere implied admission of a co-defendant who neglects or refuses to answer.

The question, then, to be considered, is, whether, from the pleadings and proofs, there appears to be satisfactory evidence of fraud, either in fact or in law, and sufficient to set aside the deed as against the plaintiff.

There are several circumstances from which actual fraud is to be inferred.

A deed brought forward as founded on a

1. The consideration alleged was inadequate. The defendant has put the deed upon the fact of a fair purchase
30

for an adequate price, and to that test the injury must be confined. A deed brought forward as founded on a valuable consideration, cannot be set up as a gift or voluntary conveyance. The party is bound by the consideration alleged. There is no doubt of this rule. (Lord *Hardwicke*, in 2 *Vesey*, 628. Lord *Redesdale*, in *Schoale & Lefroy*, 501.) All the cases relative to voluntary conveyances are, therefore, not applicable. The consideration expressed was 4,500 dollars, and yet a few days before the date of the deed, *C. Sands* had leased only a part of the premises, (one half,) for seven years, at the yearly rent of 750 dollars, which would be nearly 17 per cent. on the assumed capital, or worth of the whole land. *Barbarine*, the *tenant, says, that the property claimed by the defendant under the deed, was worth, in *September*, 1807, between 6 and 7,000 dollars. The consideration alleged could not, therefore, have been near the fair market value of the land.

2. There is no proof that the price was paid, or that any voucher or security was taken as evidence of the debt. The defendant, in his answer, says, that *C. Sands*, at the time, owed him 500 dollars, and that sum was to go in part payment, and that the residue, or 4,000 dollars, was to be paid as *C. Sands* should require it, either in money or in the assumption of debts of *C. Sands*. The debt created by the sale was, however, left in this precarious state, without any evidence in support of the verbal arrangement. We are told, also, by the answer, that small sums were paid to *C. Sands* in 1807, 1808, 1809, and 1810, and that in *September*, 1810, the defendant assumed to pay debts owing from *C. Sands* to the amount of 2,948 dollars; thus is the consideration said to have been paid without any interest being charged for all this protracted indulgence. No receipts were taken by the defendants for any of these payments. Both the debt and the payments were left to rest in the memory and in the mutual integrity of the parties. This assumption of the debts of *C. Sands* was equally frail and insecure. It was never made to the creditors themselves, but to *C. Sands*, by some writing at the foot of the list, and except the sum of 446 dollars and 20 cents, no part of those debts have, as yet, been paid by him; and though he delivered to *C. Sands*, so late as 1812, 1149 dollars and 50 cents, for the purpose of paying a part of those debts, he does not know that the moneys have been so applied. The whole of this account of the payment of a part of the consideration (for above the sum of 1,300 dollars remains to this day without any pretence of its being paid) is lame and defective, and ought to have been supported by evidence, and not left to rest upon the allegations in the *answer. The defendant

1816.

HILDRETH
V.
SANDS.

valuable consideration, cannot be set up as a gift or voluntary conveyance.

[* 44]

[* 45]

1816.

HILDRETH
v.
SANDS.

was called on to meet the charge of an impeached conveyance. The bill was not a mere bill of discovery, but for relief: to rest, therefore, entirely on the naked assertion of payments, without any proof in support of them, is a circumstance leading to the most unfavorable inference.

3. *C. Sands* continued in possession, and in the exercise of acts of ownership. He superintended the building of the ropewalk on the premises, between the date of the deed and *May*, 1807, and made the improvements within that time, at his own expense. This fact is admitted in the answer, and it is decisive evidence of ownership. *C. Sands* received all the rents quite down to *February*, 1812. The tenant says he never saw the defendant, and that he first heard of the deed in the summer of 1809, when it was mentioned to him by *Lewis Sands*, and, he thinks, as a secret; and he considered himself as tenant to *C. Sands*, until *October* or *November*, 1810, nearly four years after the date of the deed. *C. Sands* not only received the rents, but in *March*, 1811, settled with the tenant, and allowed a claim of damages which the tenant had against him *individually*, to be deducted out of the future rents; and accepted a surrender of the old lease, and gave the tenant a new lease at a reduced rent. In short, from the date of the deed to 1812, when the title of the plaintiff accrued, *C. Sands* had the whole management of the property, and the whole receipt of the rents, as the apparent owner, and was reputed as such by the tenant himself. The defendant, in his answer, says, that *C. Sands* acted all this time as his agent; but there is no certain authority produced from which that agency flowed, nor any voucher or account exhibited as evidence of the agency, nor even any assumption of that character, prior to the autumn of 1810, when *C. Sands* first represented himself as acting in that capacity. These continued acts of ownership are inconsistent with the averment of a fair, *bona fide* sale of the *property in *February*, 1807, and inconsistent with the ordinary course of dealing, when no imposition is intended to be practised upon mankind.

[* 46]

Possession of land, and taking the profits, after an absolute conveyance, is evidence of fraud, within the statute of frauds, unless such possession be consistent with the terms and object of the deed, or the character of it be openly and explicitly understood. Thus in *Stone v. Grubham*, (2 *Bulst* 225.) Lord *Coke* observed, that if a man mortgage his land, and yet continues his possession, it is no disseisin; but if the conveyance be absolute, and a continuance in possession, it shall be judged in law fraudulent, for it has the face of fraud. So, in a modern case, Lord *Loughborough* (2 *Vesey*, jun. 292.) observed, that where there was a conveyance of

an estate, and possession was retained, in that case, in respect to all third persons, the vendee would not be considered as owner, nor would the ownership of the vendor be considered as divested.

In the case of *Codwise* and others v. *Sands*, alluded to in the bill, it was held, in the Court of Errors, (4 *Johns. Rep.* 586. 593. 597.) that the receiving of rents and managing the estate by the vendor, after an alleged sale, and under an assumed agency from the vendee, but without any evidence of a genuine agency, other than the uncorroborated assertion of the party, was a strong *indicium* of fraud.

Nothing would be more destructive to fair dealing and to the rights of others, than to permit such a miserable contrivance to prevail; for all fraudulent sales could be masked in this way with the utmost facility.

4. The circumstances attending the execution and delivery of the deed, show that it was not a *bona fide* sale. The deed was executed on the 21st of *February*, 1807; and yet on the 10th of *February*, *C. Sands* had leased one half of the land for seven years, and received two years' rent in advance; and on the 15th, he received another year's *rent in advance; and on the 18th, nearly half of another year's rent in advance, and endorsed all these anticipated payments, or rather loans, on the lease, and bound himself by covenants to make improvements on the land. This was a strange proceeding in a vendor, on the eve of selling the land for its full value to his brother, who was then absent in the country; yet the purchaser kindly throws the mantle of approbation over this conduct, while he admits that *the terms of sale had been previously arranged between them*. What inducement could a fair *bona fide* purchaser have to buy for cash, and for the full value, as he alleges, land so encumbered, and when the rents and profits, for years to come, had been anticipated? What inducement could the seller have to bind himself by personal covenants to a lessee, after he had agreed to sell the land? The previous terms of sale must have been arranged (if ever arranged) *before* the date of the lease, as we may infer from the distant residence of the defendant, and the season of the year; and the lease is utterly inconsistent with any agreement for a genuine sale. This fact of the lease is alone, sufficient to give a character to the whole transaction. The deed was not delivered to the defendant himself, but to a son of *C. Sands*, as agent of the defendant, though the defendant admits that the son had no special authority to receive the deed, nor did he give any immediate notice of it to the defendant. This is another peculiar circumstance in the case.

There are other circumstances of less moment which I
VOL. II. 6 41

1816.

HILDRETH
V.
SANDS.

[* 47]

1816.

HILDRETH
v.
SANDS.

[* 48]

need not detail; nor shall I waste time in pointing out the contradictions between the several answers of the defendant, and which show, at least, very great carelessness of conduct, and great inaccuracy of memory or imbecility of mind in this whole transaction. I am satisfied, from the facts which have been stated, that the sale to the defendant was colorable merely, and intended to cover the property from claims then existing, or then impending and *anticipated, and that, as against all such claims, the deed is to be adjudged fraudulent and void.

Comfort Sands was indebted, at the date of the deed, to *Heyer* and *Gracie* about 2,500 dollars, and the debt of *Heyer* was then actually in suit at law. There was also pending in chancery the suit of *Codwise* and others, which terminated, afterwards, in charging *C. S.* personally with the sum of 2,744 dollars. When the debt of *Whitney* accrued does not certainly appear, but in *February*, 1808, he had obtained a judgment at law for 1,738 dollars and 26 cents, and under that judgment, as well as under the execution from chancery, the sale to the plaintiff was made. *Comfort Sands* acted as owner when *Whitney's* judgment was obtained, as fully as he did at the date of the deed; and if the deed was fraudulent when it was given, it was equally so at the date of that judgment, and, I may add, equally so when the execution issued under the decree in the suit of *Codwise* and others. It was held in *Hungerford v. Earle*, (2 *Vern.* 261.) that a deed not at first fraudulent, may afterwards become so by being concealed, or not pursued, by which means creditors are drawn in to lend their money. If the deed to the defendant had even been voluntary, and founded only on the ties of blood, still I apprehend the better opinion to be, that it would have been void under the statute of frauds against a subsequent creditor, provided the party was indebted at the time of the settlement, and the debt not perfectly secured, or the party not in a condition to pay. (*Walker v. Burrows*, 1 *Atk.* 93. *St. Amand v. Barbara*, *Comyn's Rep.* 255. *Stephens v. Olive*, 2 *Bro.* 90. *Lush v. Wilkinson*, 5 *Vesey*, 387. Lord *Hardwicke*, in *Townshend v. Windham*, 2 *Vesey*, 11.) That *C. Sands* was largely indebted at the date of the deed, and those debts not duly secured, appears from the debts alluded to in the answer, and those which have been proved by the plaintiff; and that he was unable to pay, though it is doubted whether that circumstance be material, (*Atherly on *Family Settlements*, p. 212 to 219.) appears from the fact that most of those debts are still unpaid, and one of them was then in a state of prosecution. It is even maintained, and with much strength of argument, that a voluntary settlement is void

A deed not fraudulent at first, may afterwards become so, by being concealed or not pursued, by means of which creditors have been drawn in to lend their money.

Whether a deed voluntary, or founded only on ties of blood, is void, against subsequent creditors, where the party is indebted at the time, and the debt is not secured, or the debtor is unable to pay?

[* 49]

Whether a voluntary settle-

against subsequent creditors, though the party was not indebted at the time of the settlement. (*Atherly*, p. 230—235.) But I need not decide either of these points; nor should I have alluded to them, had not the counsel for the defendant dwelt much upon that doctrine. The deed in question is not permitted to rest upon the ground of voluntary conveyances, though that ground would have been the most favorable to the character of the parties. The deed is put forward as containing a sale and purchase between strangers, dealing strictly with each other, for a full and adequate price; and the facts and circumstances attending it, require it to be considered, in the emphatical language of the statute of frauds, as a “feigned, covenous and fraudulent conveyance,” made with the “intent to delay, hinder, and defraud creditors and others of their lawful debts and demands, to the let and hindrance of the due course and execution of law, and to the overthrow of all true and plain dealing.”

The only remaining point is, whether the plaintiff is not entitled to the benefit of the statute, as being a purchaser under a creditor's judgment.

The statute of 13 *Eliz.*, which we have adopted, is said to be declaratory of the common law, and to extend to creditors, and to all others who have any cause of action, and is to be construed liberally in suppression of fraud. Lord Coke says, in *Twine's* case, (3 Co. 80.) that it was so resolved by all the barons of the exchequer. So, in *Tarvil v. Tipper* (*Latch*, 222.) a bailiff who executed process was allowed to protect himself under this statute against a fraudulent gift, for it was observed, that when the statute gives the principal remedy, it gives the incident. If it protects the creditor, it must protect his sale, and the purchaser under his judgment. The creditor, on any other construction, would be deprived of the fruit of his judgment, and the execution would be nugatory. There can be no doubt but that the plaintiff, as a purchaser under *Whitney's* judgment, is entitled to all the relief that the creditor himself would have been entitled to, for he stands in his place, and is armed with his rights; and though he be a purchaser at a very low price, yet it was a fair purchase in the regular course of law, and it was owing to the unwarrantable acts of the debtor himself, in throwing a cloud over the title, that his property was thus sacrificed. It does not become the parties to the fraudulent deed to complain of the plaintiff's cheap purchase. However it may be regretted that the property has yielded but a very small compensation to the creditors, this fact cannot interfere with the question of right. The auction price was an accidental thing, growing out of the peculiar circumstances of this case, and affects

1816.

HILDRETH
v.
SANDS.

ment is not void against a subsequent creditor, though the party is not indebted at the time of settlement?

[* 50]

A purchaser under a judgment creditor, is entitled to the benefit of the statute of frauds.

1816.

HILDBRETH
v.
SANDS.

only the parties concerned ; but whether such a fraudulent conveyance shall stand or fall, is a question deeply interesting to the whole community.

I shall, accordingly, decree, that the deed of conveyance from *Comfort Sands* to *Robert Sands*, in the pleadings mentioned, being made to defraud the *bona fide* creditors of *Comfort Sands*, is void as against the plaintiff; and that the plaintiff is entitled to the rents under the lease to *A. G. Barbarine*, of the 10th of *March*, 1811, &c. ; and that the plaintiff pay to the said *Barbarine* his costs of suit ; and that the defendants *C. and R. Sands* pay to the plaintiff those costs, as well as his costs of suit to be taxed.

Decree accordingly. (a)

(a) This decree was, on appeal, unanimously affirmed in the Court of Errors, *April 4*, 1817.

1816.

LYON
v.
RICHMOND.

*LYON and BROCKWAY *against* RICHMOND and others.

A subsequent decision of the Court of Errors, in a different case, giving a different exposition of a point of law from the one declared by the Supreme Court, when the parties to a suit entered into an agreement relative to such suit, can have no retrospective effect, so as to destroy the operation of such agreement.

The Court does not relieve parties from their acts and deeds fairly done, on a full knowledge of the facts, though under a mistake of the law. Every person is charged, at his peril, with a knowledge of the law.

ON the 31st of *December*, 1807, the plaintiff *Brockway* was committed to gaol on a *ca. sa.* issued out of the Supreme Court, at the suit of *Benjamin Tallmadge*, and seven others, defendants, for 2,677 dollars and 24 cents. On the 31st of *March*, 1808, *Lyon*, the plaintiff, and *Dewey*, defendant, became security to *Richmond*, defendant, sheriff of the county, for the gaol liberties granted to *Brockway*. *Richmond* was afterwards sued by the plaintiffs, in the execution, for the escape of *Brockway*, and the cause was tried at the *Cayuga* circuit in *June*, 1811, when a verdict was found for the plaintiffs, under the direction of the judge. The construction of the act relative to the gaol liberties, by the judge, having given dissatisfaction, it was proposed to bring a writ of error; and the bill stated, that to induce *Richmond*, the sheriff, to place the management of the cause in the hands of the plaintiffs, they and the defendant *Dewey* confessed a judgment to *Richmond*, on the bond given to him for the gaol liberties, for his greater security; in consideration of which, *Richmond* agreed to give up the future defence and conduct of the suit to the plaintiffs and the defendant *Dewey*. That a case was accordingly settled in the cause, with liberty to turn the same into a special verdict, and a writ of error was brought at the expense of the plaintiffs. That the plaintiffs in the execution, and *Richmond*, fraudulently combined together to supersede *the writ of error, by his, *Richmond*, assigning the judgment so confessed to him by the plaintiffs and *D.* to the creditors in the execution, and releasing the errors in the judgment obtained against him for the escape, and discharging the writ of error; and that, in consideration thereof, the creditors at law agreed to release *Richmond* from the payment of that judgment, and from all liability for the escape, which was accordingly done. That previous to this agreement, *Richmond* applied to the plaintiffs and *Dewey*, to deposit the amount of the judgment, which not being in their power, they offered

Nov. 18th, 1815,
and
Jan. 15th, 1816.

[* 52]

1816.

LYON
v.
RICHMOND.

further and sufficient security, which *Richmond* refused to accept; and carried into effect his agreement with the plaintiffs at law. That the previous security was ample, and *Richmond* applied for the security, as a pretence of violating his agreement, on receiving confession of the judgment. That the creditors instigated *Richmond*, by their attorney and agent, to make the application, from a belief that their judgment against *Richmond* for the escape would be reversed in the Court of Errors; that while *Lyon* was embarrassed and distressed at these proceedings, the agent of the plaintiffs at law represented to him that *Dewey* had property of *Brockway*, the original debtor, in his hands, sufficient to indemnify him, which might be withdrawn, and *Lyon* be thus left to pay the whole, but which might be secured by an execution issued on the judgment so confessed; that *Lyon*, yielding to such representation, consented to waive the stay of execution; and that it might issue on the judgment; that the agent of the plaintiffs at law took advantage of *Dewey's* dissatisfaction at the issuing of the execution, to detach him from the plaintiffs *L.* and *B.*, and render him wholly unwilling to co-operate with the plaintiffs in seeking redress. That the Court for the Correction of Errors, having, in 1813, determined that the return of a debtor imprisoned on execution to the liberties of the gaol before suit brought against the sheriff for the escape, was a good defence, the reversal of *the judgment against *Richmond* for the escape was clear and certain, such decision being unquestionable evidence of the law on the subject, under which the plaintiffs at law could have no right to enforce the judgment so confessed to the said *Richmond* for his indemnity merely, against a liability which had not occurred. The bill prayed for an injunction against the execution, and for general relief.

[* 53]

Richmond, *Dewey*, and *W. L. Tallmadge*, put in their joint and several answer, in which they denied that the plaintiffs and *D.* confessed judgment on their bond to *R.*, on his agreeing to give up the future conduct of the suit against him for the escape. *Richmond* said that he never sued out any writ of error, or authorized any person to sue such writ on the judgment against him, nor did he conceive himself bound to do so, though he should have been willing to have allowed the plaintiffs and *Dewey* to have prosecuted the writ in his name, if they had well indemnified him therefor, and against his liability to the plaintiffs on their judgment against him. That after the verdict, and before judgment was obtained against him, he became alarmed on being informed that *Lyon* was about conveying his real estate to one *N. Fisk*, and proposed to the attorney of the

1816.

LYON
V.
RICHMOND.

plaintiffs at law. to assign the judgment on the bond for the liberties, if they would discharge him from the suit for the escape; but they did not accede to the proposal. After judgment was obtained against him, the attorney of the plaintiffs at law proposed to take the assignment, and he, *R.*, called on *L.* and *D.*, and told them of the proposal, and that he would not assign the judgment, and would permit them to prosecute the writ of error, if they would deposit money sufficient for his indemnity, or give adequate security; and *L.* and *D.* said that they could not go beyond the security of the judgment, and sundry obligations, chiefly against *N. Fisk*, for a part of the amount of the judgment, and that they could not blame *R.* for availing himself of the *proposed arrangement. *R.* and *D.* stated further, that they and *L.* afterwards went to the attorney of the plaintiffs at law, and *L.* and *D.* made proposals to settle the suit against *R.*, but that, *L.* and *D.* disagreeing as to the amount which each was to pay or secure, the settlement did not take place; and *R.* said, that on the same day he did, with the knowledge and entire approbation of *L.*, assign the judgment on the bond to the plaintiffs at law, and receive a discharge from the judgment for the escape; that *Lyon* expressly agreed with the attorney of the plaintiffs at law, that execution might issue on the judgment so assigned, so as to obtain a due and just part of the amount out of the property of *D.*, the other surety; and that *L.* accompanied the sheriff to the house of *D.* in order to make the levy; and that on the day the assignment was made, he released all errors in the judgment against him for the escape, and which was then known to *L.*, and was no more than an act of justice. That the plaintiff *L.* acted, as *R.* believed, without any misconception of his rights, or any fraud or misrepresentation on the part of the defendants, or any other person.

[* 54]

The defendants *T.* and *D.* denied any agreement to detach *D.* from the plaintiffs, and all fraud on *L.* to procure his assent to the assignment, &c., and averred that, according to their knowledge and belief, the facts, as stated by *R.* in his answer, were true. All the other defendants denied all knowledge of the facts stated in the bill; and they referred to the answer of the other three defendants, and stated that they believed and expected to prove the facts in that answer to be true, and prayed that the same might be taken as their answer, according to their information and belief.

Joseph L. Richardson, the principal witness on the part of the plaintiffs, stated, that the stipulation to confess judgment in the suit on the bond for the liberties, was

1816

LYON
v.
RICHMOND.

[* 55]

given on the express agreement of the attorney of *Richmond*, that *L.* and *D.* should have leave, at their own expense, *to turn the case in the suit of *Tallmadge & Co.* against *R.* into a special verdict, and bring a writ of error thereon; to all which *Richmond* assented; and that they, *L.* and *D.*, employed counsel for the purpose.

That *L.* and *D.* remonstrated with *Richmond* against his assigning the judgment, who stated his reasons for doing it, and that he should assign the judgment, and release the errors in the suit for the escape, unless *L.* and *D.* would deposit the amount in money, or give satisfactory personal security; that *Lyon*, afterwards, offered *Nathan Fisk*, (proved by several witnesses to be a man of property,) to consent to give security for 1,800 dollars; but *Dewey* refused to furnish an equal amount; that *Lyon* then consented to the execution issuing against him and *B.* and *D.*, on *Mumford's* representing that *Dewey* had property of *Brockway* in his hands sufficient to discharge the greater part of the amount, which might be withdrawn. Another witness stated a conversation between *L.* and *R.*, in which *R.* admitted, that *L.* always opposed the assignment, but said, "You recollect that, after the assignment, I asked you if you blamed me," and *Lyon* replied, "I cannot blame any man for wishing to get out of trouble." Several witnesses testified to the hostility of *Dewey* towards *Lyon*.

The defendant *Dewey* was examined as a witness in the cause. His testimony, and that of *T. Mumford*, the attorney and agent of *Tallmadge & Co.*, supported all the material facts stated in *Richmond's* answer; and they both, after detailing all the circumstances relative to the assignment of the judgment, execution, &c., denied all knowledge of any fraud, misrepresentation, or concealment, on the part of *Tallmadge & Co.*, in obtaining the assignment and release of errors, but, on the contrary, said that the same was fairly obtained, and with the knowledge of *Lyon*. They also stated, that *Brockway*, the original debtor, was insolvent, and had applied to be discharged under the insolvent *act. *Jonathan Whitney*, a witness also for the defendants, deposed, that he saw *Lyon* and *Dewey* together at *Cayuga*, in 1812; and *Dewey* offered to secure 10 or 12 hundred dollars, on *Lyon's* securing the rest, so as to prevent the assignment, agreeably to what *Lyon* had before offered, but *Lyon* then insisted on *D.'s* securing 1,400 dollars, or that he, *Lyon*, would have nothing to do with the business, and that *Richmond* might take out an execution as soon as he pleased; and as his, *Lyon's*, property was secure, he did not care any thing about the execution; and that in consequence of this disagreement between *L.* and *D.*, the proposed arrangement

[* 56]

was not made; and the assignment by *Richmond* of the judgment against them and *Brockway*, to *Tallmadge* and the others, was made the next day.

1816.

LYON
v.
RICHMOND.

The cause was argued on the 18th *November* last, by

Gold, for the plaintiffs, and

Riggs, for the defendants.

The following opinion was this day delivered by the Court: January 15th,
1816.

THE CHANCELLOR. A suit between these same parties, on the same subject, was brought to a hearing in *August* term, 1814, on demurrer to the bill, and the bill was dismissed.† There was, then, no charge of fraud in procuring or making the assignment and release stated in the case, and it appeared that the sureties of *Brockway* had no equity in their complaint against *Richmond*, the sheriff. The charge against him was, that he had thought proper, for his own safety, to settle and discharge a judgment against him for an escape, after the sureties had neglected or refused, upon due notice, either to deposit money or to *give him other requisite security, and after they had assented to that arrangement.

† 1 *Johnson's*
Ch. Rep. 184.

[* 57]

The bill now contains the allegation that the assignment of one judgment, and the release of errors in the other, were procured by a fraudulent agreement between *Richmond* and *Tallmadge, Smith & Co.*, to the oppression and injury of the sureties of *Brockway*, in depriving them of the benefit of a writ of error on the judgment against *Richmond*. The object of the bill, as explained by the counsel, is to obtain the liberty and the ability to prosecute such a writ of error, and an injunction to restrain the use of the release. But as the charge of fraud is directly denied in the answer, and is not supported, but absolutely repelled by the proof, the cause would seem to rest now on the same ground precisely that it did before.

The answer of *Richmond* explicitly denies that the judgment in his favor was confessed by *Lyon* and *Dewey* upon any condition or agreement by him, to give them the future control of the judgment against him; and as there is but one witness who testifies to any such agreement, it cannot be considered as established. The answer of *Richmond* equally denies the existence of any fraud, by concealment, misrepresentation, or otherwise, in procuring the assignment and release. The proposition was fairly made to him, and

1816.

LYON
v.
RICHMOND.

[* 58]

he told the sureties of *B.* of the proposal, and that he would not assign the judgment he had against them, but would permit them to prosecute the writ of error in his name, on the judgment of the creditors against him, if they would deposit money, or give him other sufficient security by way of indemnity. They would not, and did not do either, and the proposition was finally carried into effect with their knowledge and approbation. That *Richmond* gave this information to *Lyon* and *Dewey*, and told them that he should assign his judgment against them, and should release *the errors in the judgment against him, unless they gave him that security, and that they did not comply, and that *Lyon* afterwards admitted that *Richmond* was free of blame in executing the assignment and release, are facts proved even by the complainants' witnesses. That the assignment and release were both executed with the full knowledge and approbation of the sureties, *Lyon* and *Dewey*, and with perfect fairness and candor, is proved by the two witnesses, *Dewey* and *Mumford*, with a precision and circumstantial detail, that demand our belief. There is nothing to shake the credit of their testimony. *Dewey* is a competent witness for his co-defendant *Richmond*. There is nothing prayed for or proved against him, to show him in default, or to charge him, in any event of the suit, with costs to the complainants. The answer of *Richmond*, supported by the testimony of these two witnesses, is perfectly decisive in favor of the fairness of the whole transaction, and the free and full knowledge and assent of *Lyon*. There is no evidence in contradiction to the plain narration of these witnesses. The previous reluctance of *Lyon* or *Dewey* to the assignment and release, as stated by the complainants' witnesses, is not inconsistent with their subsequent assent at the consummation of the transaction. The conduct of *Lyon*, in aiding and assisting the service of the execution issued after the assignment and release, is strong corroborating proof against his charge in the bill. Both *Richardson* and *Dewey* prove, that the previous proposal communicated to *Lyon*, related as well to the release of errors in one judgment, as of the assignment of the other. In short, I see no possible room to doubt of its being a fair transaction on the part of *Richmond*, founded on due previous notice and warning to the sureties of *Brockway*, and on their subsequent free and full acquiescence.

[* 59]

Fraud out of the case, I see no ground for the present bill; the assignment and release were fairly procured by **Tallmadge, Smith & Co.*, and they are entitled, in law and equity, to hold them. If they, by their agent, were free from any improper conduct in procuring those deeds, there is no reason why this Court should interfere to deprive them

of the benefit of either, even if *Richmond* had not dealt kindly with *Lyon*. But I do not see that *Richmond* stands otherwise than perfectly acquitted. He made a fair proposition to those who had undertaken to indemnify him. He was entitled to be acquitted and discharged from his responsibility. A judgment had been recovered against him at law, after a defence made to the best of his power. He was not bound to expose himself to further risk. He had reason to apprehend danger to his remedy over. *Dewey* says he knows, that about the time of bringing the suit against *Richmond*, *Lyon* had conveyed his farm to one *Fisk*; and another witness (*Whitney*) heard *Lyon* say, before the assignment, that *Richmond* might take out execution as soon as he pleased, for that his property was secure. *Richmond* had, therefore, good right to demand of *Lyon* and *Dewey* perfect security, either in a deposit of money, or of other personal security, adequate to his indemnity, before he consented to continue longer exposed to the operation of the judgment against him. It was their duty to have made him secure, if they wished the use of his name to try the chance of a writ of error. They refused to give the security, either from inability or unwillingness, and when they gave their subsequent assent to the assignment and release, and the issuing of the execution, it was what they were competent to give, and to which they ought to be bound.

Much was said respecting a decision of the Court of Errors in another cause, in the year 1813, by which it is inferred, that if the sureties had been permitted to have prosecuted a writ of error on the judgment against *Richmond*, they would have been successful. Whether this would have been the case, and the judgment against *Richmond*, *and the judgment reversed on error in 1813, have been deemed so analogous in their circumstances as to have led to the same conclusion, is a question not before me, and which I shall not undertake to decide. I have nothing to do with such an inquiry. A subsequent decision of a higher Court, in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect, and overturn such settlement. The Courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul every thing that has been done in other cases of the like kind, for years before, under

1816.

LYON
V.
RICHMOND.

[* 60]

1816.

LYON
V.
RICHMOND.

a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found. This case, therefore, is to be decided according to the existing state of things when the settlement in question took place.

There is a fact connected with this case, which is of great weight against *Lyon*, the complainant. I allude to the decree read at the hearing, and pronounced in *June* last, in the suit of *Tallmadge* and others against *Lyon* and others, in which a sale of the property of *Lyon* and *Dewey*, under the execution of the judgment so assigned, was charged with being affected with fraud, and that *Lyon* was a party to the fraud. The decree was taken by default against *Lyon* and others, and the sale set aside as fraudulent, and the complainants allowed to cause the property to be resold under that judgment. That decree has never been questioned, and remains good; and can it be impeached in *this* collateral way? Can it now be said, in the face of that decree, that *Tallmadge* and others had no right or title to such a judgment and execution? Nothing could be productive of more confusion, or more effectually destroy the credit and verity attached to judicial records.

[* 61]

There is another difficulty which must embarrass the claim of the present plaintiffs. The answer of all the defendants under the firm of *Tallmadge, Smith & Co.*, except one, refers to, and adopts as their answer, the answer of *Richmond* and others, and no replication has ever been filed to their answer, by which it is, as to them, admitted to be true; and if they are entitled to hold and enjoy in full right the assignment and release, it cannot be affected at all.

But these are minor considerations, and only serve to multiply the insuperable difficulties under which the pretension of *Lyon* labors. I place my opinion chiefly on broader ground; on the absolute failure of the plaintiffs on the merits.

The bill must, accordingly, be dismissed as to all the defendants, with costs; and every injunction heretofore issued, at the instance of the complainants or others restraining the defendants, or any of them, from proceeding under the judgment assigned as aforesaid, is hereby declared to be dissolved.

Decree accordingly. (a)

(a) On appeal, this decree was reversed, (*April* 4th, 1817,) by a majority (one only) of the Court of Errors: four of the judges of the Supreme Court were for affirming the decree.

1816.



HART
V.
TEN EYCK.

* HART *against* TEN EYCK and others.

Where an *answer* is put in issue, what is confessed and admitted need not be proved; but where the defendant admits a fact, and insists upon a distinct fact by way of avoidance, he must prove the fact so insisted on in defence.

If an administrator omits to file an inventory of the goods of the deceased, pursuant to the statute, it is a strong circumstance in support of the charge of improper conduct.

If an administrator exhibits an untrue account of the personal estate of the deceased to the Court of Probate, by which he fraudulently obtains an order for the sale of the real estate, he must not only account for the personal effects omitted in his statement, but is answerable for the real estate sold, and that, according to its value at the time of filing the bill against him.

If a person having charge of the property of another, so confounds it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion; if he cannot distinguish and separate his own, he will lose it; and if damages are given to the plaintiff, the utmost value of the article will be taken.

A bill may be filed in this Court to redeem personal property pledged for a debt. But the creditor holding goods in pledge may sell them without a bill for foreclosure, on giving reasonable notice to the debtor to redeem.

Aliter, in case of a mortgage of *real* estate, which can never be sold without a bill for foreclosure, and a decree for a sale.

HENRY HART, the father of the plaintiff, died intestate, in *May*, 1788, leaving the plaintiff, then about four years old, a younger son, and his wife, surviving. The plaintiff's brother died, under age, without issue, and intestate, and the plaintiff's mother also died, intestate; and the plaintiff became entitled, as heir at law, to all the real and personal estate of his deceased father. The bill, which was filed against *Abraham Ten Eyck* and *Jeremiah Van Rensselaer*, stated, that the plaintiff's father left a large personal estate, consisting of leases, mortgages, ready money, certificates, called class-rights, public certificates, household furniture, farming utensils, stock and grain, on a farm at *Kingsbury*, in *Washington* county, where he died, goods and chattels of great value beyond the amount of his debts; that he also died seized of a large real estate, or in trust for him, situate in different counties; that on the 16th of *January*, 1789, the defendants *Abraham Ten Eyck* and **Jeremiah Van Rensselaer* took out letters of administration, and possessed themselves of all the personal estate of the intestate, of all the books and accounts relative thereto, and of all the deeds and evidences of the real estate. That, on the 20th of *March*, 1802, the administrators fraudulently, and under

Nov. 23d, 1815,
and
Jan. 16th, 1816.

[* 63]

1816.

HART
V.
THE EYCK.

[* 64]

false representations of the sums which remained due from the intestate, of the insufficiency of the personal estate to satisfy the debts, and of the value of the real estate, obtained an order of the Court of Probates for the sale of all the real estate of the intestate. That for the purpose of obtaining that order, the administrators exhibited to the judge of the Court of Probates, a statement and estimate of the intestate's property, (a) as amounting to 3,520 pounds, or 8,800 dollars; whereas, as the plaintiff charged, the statement and valuation were intentionally deceptive and grossly inadequate; that 15 class-rights, estimated at 2,500 dollars, consisted of 15 lots of land of 600 acres each, lying in the military tract, in the now counties of *Onondaga*, *Seneca*, and *Cayuga*, which, on the 1st of *January*, 1802, were worth, at least, the average price of 3 dollars per acre, or the gross sum of 27,000 dollars, and for which letters patent had been taken out by one of the *administrators. That the other lands were not estimated at half their value; and that the house and lot in *Pearl* street were worth 1,250 dollars beyond the encumbrance; and that the bonds and mortgages were ample security, and bore an interest of 5 per cent. on each 100 acres, payable annually.

That the administrators never made and filed an inventory of the goods, chattels, and credits of the intestate, in the office of the surrogate of *Washington* county, nor had they filed such inventory before the application to the Court of Probates for the sale of the real estate; nor had such inventory been since filed; nor had they, at the time the order for the sale of the real estate was made, applied the personal estate of the intestate to the payment of the debts. That the plaintiff left this state when he was about 11 years old, and went to *Canada*, where he remained until *November*, 1807, and, during all the period of his absence, the administrators never gave him any notice of their proceedings; but,

(a) The following is the statement made by the administrators, signed by them, and dated *January*, 1802:

Lots No. 7	127 acres,		
8	172 do.	in <i>Skenesborough</i> , estimated worth.....	£ 400
Lot 3	100	about two miles from <i>Albert Mabie's</i> ,.....	150
Lot 19	80	150
Lot 29	52	130
Lot 33	100	<i>Butlersbury</i> patent,.....	200
Lot 10	34	rent and reversion of 49 acres,.....	300
Lot 60		<i>Kingsbury</i> patent, lease 6l. per annum,.....	80
Lot 112	100	in possession of <i>Henry Lake</i> ,.....	200
3 Bonds and Mortgages for 882l., at about 3 per cent. per annum,			
principal payable in <i>October</i> , 1802, now worth about.....			700
No. 11, in a patent granted to <i>William Wood</i> , on the east side of <i>Scarrie</i> kill, 180 acres,.....			
15 Military Class-rights,.....			1000
House and Lot in <i>Pearl</i> street, subject to a bond and mortgage held by <i>P. E. Elmendorf</i> .			

on the day of the order for the sale of the real estate, procured *John C. Cuyler* to be appointed by the judge of the Court of Probates, guardian of the plaintiff; that the said guardian, understanding that he was appointed for the sake of form only, never investigated the accounts of the administrators of the personal estate, nor ever made any inquiry as to the real estate, or took any care of the plaintiff's interest.

That on the 5th of *April*, 1802, the administrators caused an advertisement to be inserted in the newspaper called the *Albany Register*, that all the real estate of the intestate would be sold at auction on the 4th of *May*, then next, at the *Tontine Coffee-House* in *Albany*; and without any other notice, the greater part of the intestate's estate was sold on the 4th of *May*, and several days following, the particulars of which were stated, and the net proceeds of which sales amounted to 8,482 dollars and 75 cents, according to the account rendered by the administrators to the Court of *Probates. That at the time of such sales, the property sold was worth at least 27,900 dollars. That the most valuable parts of the lands were struck off by *Ten Eyck*, who acted as auctioneer, to the relations, friends, and acquaintances of the administrators; that many of the purchases were made under an express or implied trust, that the administrators, or one of them, should be interested therein; that the three mortgages against *Spencer*, *Tupper*, and *Kingsley*, were bought in for the benefit of *Ten Eyck*, and assigned to him, or to some one by him appointed, and the full amount of the mortgages received.

That the administrators, *Edward Cumpston*, and the intestate, about the year 1783, entered into partnership in the purchase of soldiers' rights to bounty land; that the purchases and transfers of such rights were all made in the name of *Cumpston*, who continued to hold them until about the year 1790, when the letters patent for the bounty lands were generally issued in the names of the officers and soldiers entitled to the lands; that more than 100 of these rights had been previously purchased for the use of the said partnership, at their joint expense, and that, upon a settlement, more than 20 rights were allotted to each partner, none of which were assigned to the intestate. That the administrators procured conveyances from *Cumpston* of all the rights to which the intestate was entitled under the partnership, (except 15 rights of which they admitted him to be owner,) to them or one of them, or in trust for them, and have obtained awards for them by the *Onondaga* commissioners, and disposed of them unknown to the plaintiff. That the intestate, in his lifetime, was owner of a great number of class-rights granted to the troops of this state, which the adminis-

1816.

HART
V.
TEN EYCK.

[* 65]

1816.
 HART
 V.
 TEN EYCK.
 [* 66]

trators, or one of them, held in trust for the intestate ; that these rights have been disposed of by the administrators, or one of them, and patents obtained by them, or one of them, and the lands sold, or are kept concealed from the plaintiff. That the administrators refuse *to render any account of their administration, or to disclose the real and personal estate of the intestate, or to pay to the plaintiff his share thereof, &c. The bill sought for a discovery and relief.

The defendants *Ten Eyck* and *Van Rensselaer* put in their joint and several answer, on the 10th of *December*, 1808. They denied that any personal estate of the intestate remained, after paying his debts, but that the personal estate was altogether insufficient for that purpose, and referred to accounts annexed to their answer. The defendant *Van Rensselaer* said, that being a creditor of the intestate, he joined with *Ten Eyck* in the administration, at his request, and on his promise that he should be at no trouble in transacting the business of the estate ; and that he, therefore, took but little charge in the administration, and could not give, of his own knowledge, any account of the personal estate or debts ; but, from the information of *Ten Eyck*, he believed the account given by him to be just and true. They said they knew of no personal property or estate whatever, of the intestate, except as they afterwards set forth in their answer ; and *Ten Eyck*, for himself, said, that being a creditor of the intestate, he with *Van Rensselaer*, took out administration, the 15th of *January*, 1789, from the surrogate of *Washington* county, and that he went to *Kingsbury*, and used all reasonable diligence in ascertaining the amount of the personal estate. They admitted that the intestate was entitled to, or claimed, divers parcels of land, which were valued by them, on the 1st of *January*, 1802, (as stated in the plaintiff's bill,) and they knew of no other real property of any kind, of which the intestate died seised or possessed.

[* 67]

Ten Eyck said, that he took possession of all the personal estate and effects of the intestate, which could be found or obtained, with the books and accounts, and sundry deeds and papers relative to the real estate, but denied that he ever concealed the same from the plaintiff ; and he annexed *a particular statement thereof to his answer. *Van Rensselaer* denied that he ever possessed himself of any of the personal estate of the intestate, except what is mentioned in the account, or of any deeds, writings, or papers, relating to any real or personal estate, other than powers of attorney, and transfers of military rights and certificates described. That previous to his death, the intestate deposited, for safe keeping, with the defendant, the powers and transfers for conveying 15 soldiers' rights, and which remained in his

possession until the death of the intestate; and on the 25th of *April*, 1795, he, *Ten Eyck*, filed the same powers and transfers in the office of the clerk of the county of *Albany*, agreeably to the act, and had them registered there, and took the clerk's receipt for them. That the patents for those rights were taken out by him, some time in the year 1790, and remained in his possession a considerable time; that he afterwards delivered them to some person, but whom he could not recollect, nor when he delivered them, and that none of them was in his possession, nor did he know where they are.

The defendants denied that the order for the sale of the real estate was obtained fraudulently, or by any false representations; but that the real and personal estate were justly and truly stated, according to the best of their knowledge and belief, and were so stated to the Court of Probates: they admitted that, to obtain the order, they exhibited the statement and valuation of property to the Court of Probates, as set forth in the plaintiff's bill, but denied that they knew the statement and valuation to be deceptive and grossly inadequate; that they made the same according to their best judgment, information, and belief. That in making the valuation, they took into consideration the great uncertainty of value of those lands, owing to the many interfering claims and frequent transfers of the same lots by the same soldiers to different persons; and that several of the military lots, which were specified, had been awarded by *the *Onondaga* commissioners to other persons; that considerable doubts were, therefore, entertained by the defendants, as to the validity of the titles to the lots specified, as well as to the others; that they employed counsel to attend before the commissioners, but the proofs of title were so imperfect, that only one lot was awarded to the estate of *Hart*, or the plaintiff. That military lots were not worth, at that time, three dollars per acre, and if the titles had been good, the 15 lots would not have been worth near the sum of 27,000 dollars. They also denied that the other property was undervalued; and the three mortgages, though sold fairly at auction, brought much less than the sum at which they were valued. The defendants said they did not know whether any inventory of the personal property had been filed, though one had been prepared by *Ten Eyck* soon after the death of the intestate. *Ten Eyck* said, that all the personal estate of the intestate was applied to pay the debts, previous to the application for the order for the sale of the real estate. He denied that *Cuyler* was appointed guardian for the plaintiff for form's sake merely, or that any such suggestion was made to him, whereby he was lulled into security or inattention to his guardianship.

They admitted that the plaintiff went to *Canada*, and re-

1816.

HART
V.
TEN EYCK.

[* 68]

1816.

HART
V.
TEN EYCK.

[* 69]

sided some time with his uncle, *Aaron Hart*, (who was a creditor of the intestate by bond for 2,000 dollars,) and, afterwards, with his cousin, *Moses Hart*, son of the said *Aaron Hart*. That *Moses Hart* took an interest in the matters of the intestate's estate, examined the books and accounts in relation to it, and was in *Albany* before and at the time of the sale of the real estate, and heard and approved of the proceedings in relation to it. That the order of the sale was as stated in the bill; that on the 4th of *May*, the first day of the sale, two hundred persons, at least, were present, and among them, *Moses Hart*; that **A. Ten Eyck, jun.*, at the request of the defendants, acted as auctioneer, and no property was struck off, until *Moses Hart* was satisfied that no better bid could be obtained. The mortgages, and several parcels of land in *Butlersbury, Kingsborough, &c.*, were sold on that day. *Isaac Ranson* purchased the mortgages for *A. Ten Eyck, jun.* The remainder of the sale was postponed to the next day, and, as few bidders then appeared, it was postponed to the 12th of *May*, and notice thereof given in two gazettes, and 200 copies of the advertisement, in handbills, were distributed in *Albany*. That on the 12th of *May*, lot No. 8, in *Skenesborough*, and eight military lots, were sold; the particulars of which sale were set forth, and the names of various persons who were present at the sale were mentioned. The defendants denied that they were concerned, directly or indirectly, by trust or otherwise, in the sales; or that any offer to purchase by private sale had been made, or that the lands could have been sold better. They took no pains to examine any of the lands, in order to ascertain their value; but relied on general information as to the value, and their own knowledge. That the sales were fairly made; and they denied that the most valuable of the lots were struck off to their relations and friends, (except in the instance mentioned for *A. Ten Eyck, jun.*) and they denied all concern, collusion, or secret understanding, between them and the purchasers, or in any manner relating to the lands so sold.

[* 70]

The defendants denied that they, with *Cumpston* and the intestate, or either of them, were ever in partnership in the purchase of soldiers' rights; but admitted that *Cumpston* and the intestate acted as agents for them, in purchasing soldiers' rights, and were furnished with money for that purpose; that *Cumpston* and the intestate purchased, at their stores in *Albany*, a number of such rights for four and five pounds each, for they which paid partly in cash, and partly in goods, which belonged to them, and the profits arising from such purchase with goods, were to be for their benefit exclusively.

Van Rensselaer admitted that *Cumpston* and the intestate,

1816.

HART
v.
TEN EYCK.

as agents, purchased for the defendants and others, whom he named, about 100 rights, and that the powers to convey the rights were, from time to time, lodged with him, the defendant; that on the 5th of *June*, 1786, *Cumpston*, *Hart* and the defendant, came to an adjustment relative to 63 of the rights so deposited, and *Cumpston* took 12 of them to his own use, *Hart* retained 21 for his own use, and the residue, with the powers of transfers, were left with him, the defendant, for the joint benefit of himself and *Ten Eyck*, and for which they had before advanced cash to *Cumpston* and *Hart*, at the rate of five pounds for each right; 15 of them were deposited by *C.* and the same number by *H.* That soon after the adjustment, in 1786, he purchased of the intestate *seven* of the twenty rights then held and retained by *Hart*, at an advanced price of 20 per cent., and he believed the seven rights were, as he specified, but he could not distinguish the seven from the rest of the ten rights. *Ten Eyck* said, he was concerned with *Van Rensselaer* in the purchase of the soldiers' rights; that he had no knowledge of the transactions, but what he derived from *Van Rensselaer*, who had the management of the business.

Van Rensselaer said, that some time previous to *May*, 1787, the intestate being much embarrassed on account of debts, and being considerably indebted to him, deposited with him a number of class-rights, by way of pledge or security for the debts so due from *Hart* to the defendant; that the amount of debts due to him was £689 9s. 7d., but he could not recollect how many certificates of class-rights were so deposited, nor in whom any of them were originally vested, not having kept any written memorandum of them. That he, afterwards, received verbal instructions from the intestate, to dispose of *and manage the said class-rights as he should think best, in order that he might retain, out of the proceeds thereof, the amount of his debt, and that he should account therefor with *Hart*. That in pursuance of such deposit and instructions, he afterwards located in his own name 3,880 acres of land, lying on the north side of the *Sacandaga* river, and on the 28th of *May*, 1787, received a patent for the tract, and that the location and patent comprehended the quantity of land due for the class-rights so deposited with him by *Hart*. That class-rights, about that time, were generally worth about one shilling per acre, prior to location; that on the 9th of *November*, 1790, he conveyed to *Ten Eyck* 503 acres of the patent, pursuant to an order in writing, dated the 21st of *February*, 1788, which order, he believed, was lost or destroyed; that he received no consideration from *Ten Eyck*, nor did he know the terms on which *Hart* disposed of the land; that on the 27th of *November*, 1790, he conveyed 750 acres of the tract to *James Boyd*, an assignee of *Job Wright*, to satisfy

[* 71]

1816.

HART
V.
TEN EYCK.

[* 72]

an obligation of *Hart* to *Boyd*, dated the 14th of *July*, 1783; that no money was required to be paid to him, and he did not know the terms or consideration of the contract. That according to the general instructions of the intestate before mentioned, he conveyed, in 1791, the remainder of the tract, being seven lots, which he specified, to different persons who were named, and credited the estate of the intestate with the sums of money received for the same, according to the accounts exhibited, in which he made no charge for commissions in relation to his services. That he was afterwards called upon, by *Isaac Lytle*, to convey 1,000 acres of the contract, in consequence of a contract of the intestate, dated the 14th of *July*, 1783; that having conveyed away all the said tract, he agreed to convey to *Lytle* 750 acres of land on *Grass* river, belonging to the defendant, in lieu of the 1,000 acres, which *Lytle* accepted, and the 750 acres were accordingly conveyed to him; that he *charged the estate of *Hart* with 1,000 acres at 6s. and 6d. per acre, being the price of the *Sacondaga* lands at that time, and that lands on *Grass* river now sell at four and five dollars per acre; that he does not know where the contract of *Hart* now is; that he knows of no other class-rights of the intestate, than those so delivered to him, nor of any certificates of public debt belonging to the intestate, and that no such certificates ever came into his, the defendant's, possession or custody.

Ten Eyck said, he knew nothing on the subject of the class-rights mentioned by *Van Rensselaer*, but from hearsay, except the conveyance of the 503 acres to him. That prior to the location of the tract, the intestate asked him if he had any class-rights to locate, and that if he had, they might be located together with those of the intestate; and that he accordingly delivered his class-rights to the intestate, who, afterwards, informed him, that he had delivered them to *Van Rensselaer*, and gave him an order on *Van Rensselaer*, for the amount of them, on which he received the conveyance of the 503 acres.

Ten Eyck then set forth, as he said, a just and true account of all the goods and chattels, rights and credits of the intestate, so far as the same had come to his knowledge, consisting of stock on the farm, farming utensils, and household furniture, and the prices at which they were sold, amounting to 86l. 13s., and also a list of promissory notes, which he put into the hands of a justice to be collected, and for which he received from the justice 27l. 12s. 7d. The defendant also set forth an account of bonds and mortgages; an account of all the personal estate of the intestate which he had received, which corresponded with the debtor side of his account, as exhibited to the Court of Probates.

The total, with interest to the 1st of *January*, 1802, being 3,256*l.* 10*s.* and 8*d.*

Van Rensselaer also set forth an account of what he had received out of the personal estate, and of the moneys paid *and advanced in relation to the estate, and which agreed with the debit and credit side of the accounts exhibited to the Court of Probates, and leaving a balance due to him from the estate, on the 1st of *January*, 1802, of 1,406*l.*, or 3,515 dollars. He also stated an account of moneys retained and paid by him to the 8th of *June*, 1799, leaving a balance due him of 109*l.* 1*s.* 7*d.*; and he also exhibited a statement of debts due from the estate of the intestate, unsatisfied, amounting, on the 1st of *January*, 1802, to 2,372*l.* 7*s.* 10*d.*, or 5,930 dollars and 98 cents.

He further stated, that, soon after letters of administration were taken out, he made an inventory of such of the intestate's personal property as could be found or discovered, with the aid of *Rynier Visscher* and *Peter B. Tierce*, two respectable inhabitants of *Washington* county, and which was annexed to his answer, dated the 11th of *February*, 1789. He set forth, also, a list of all the books of accounts of the intestate, in his hands, or known to him.

Van Rensselaer having died on the 19th of *February*, 1810, the suit was revived against his legal representatives, who are the other defendants in the cause.

Abraham A. Lansing, one of the defendants, answered to the bill of revivor and disclaimer: general replications were filed to the answers of all the other defendants.

The above statement of the pleadings presents the matters in controversy between the parties. It is not thought necessary, for the purpose of these reports, to attempt to give a detail of the depositions and exhibits in the cause, which were very voluminous. The material parts of the evidence are, it is believed, sufficiently stated in the very elaborate opinion delivered by the Court.

The cause was argued in *November* last, by *Van Vechten*, and *Henry*, for the plaintiff, and by *Woodworth*, and *E. Williams*, for the defendants.

*The following points were stated by the counsel for the plaintiff:—

1. That the accounts of the administrators were erroneous and false.
2. That the order of the Court of Probates for the sale of the whole of the real estate of the intestate, was fraudulently obtained.
3. That the order of sale was fraudulently executed.

1816.

HART
V.
TEN EyCK.
[* 73]

[* 74]

1816.

HART
v.
TEN Eyck.

4. That the defendants are, therefore, answerable for the present full value of the estate sold under that order.

5. That there have been fraudulent concealments and dispositions of various portions of the real estate to which the plaintiff was entitled, as heir at law of the intestate, especially by *Jeremiah Van Rensselaer*, deceased; and that his representatives should be decreed to pay the present full value of what may have been sold, and to convey what remained unsold to the plaintiff.

The defendants' counsel stated the following questions:—

1. Have the defendants received more personal property than is contained in their statement; and if so, what is the amount thereof?

2. Had the administrators, previous to the 20th of *March*, 1802, applied all the personal estate that came to their hands, in the discharge of debts, and were there still large sums due from the intestate remaining unpaid?

3. Was there any thing fraudulent or knowingly false in relation to the valuation of the property exhibited to the Court of Probates? If not, is there such error, as in equity will make them liable for the mistake?

4. Have the administrators so conducted the sales as to make themselves responsible to the complainant?

5. Is there proof of any real estate, other than that set forth by the administrators?

[* 75]

6. Is there evidence to prove that *Jeremiah Van Rensselaer* located lands in trust for *Henry Hart*, other *than that derived from the answer, which avers that *Henry Hart* directed the sale of the lands?

7. And if there is not, does the answer implicate the representatives of *Jeremiah Van Rensselaer*, in respect to the location at *Sacandago*?

Jan. 15th, 1816.

The cause stood over for decision until this day, when the following opinion was delivered by

THE CHANCELLOR. This is a suit by the son and heir of *Henry Hart*, calling the administrators of his father's estate to account, and charging them with gross and multiplied acts of waste and fraud, by means of which, as it is alleged, a large and valuable estate, descended to him by inheritance, has been dissipated.

The testimony taken in the cause is voluminous, and the transactions which are embraced by the case are, in some degree, intricate, owing to the length of time, and the nature and variety of the subjects to which they relate. To give
62

as much simplicity and perspicuity as may be in my power to the examination of so complicated a case, I shall arrange what I have to say under the following heads:—

1. Whether the accounts of the administrators, as exhibited in the first instance to the Court of Probates, and afterwards to this Court, be erroneous and false, and accompanied with concealments and fraudulent dispositions of various portions of the estate.

2. Whether the order of the Court of Probates for the sale of the real estate was either fraudulently obtained, or fraudulently executed; and,

3. In case these charges, or either of them, be true, what is to be the rule or measure of damages?

I ought, perhaps, to observe preliminarily, that in the course of the investigation, I have felt, with unusual sensibility, the weight and delicacy of the duty imposed on me, by reason of the magnitude of the inquiry, the relation *in which the parties stand to each other, the grave accusations, and the important principles which the case involves. On the one hand, the plaintiff is a young heir, stripped of all his expectations, and relying solely on the paternal protection of this Court in the assertion of his rights, which, he says, have been wantonly sacrificed during his infancy. On the other hand, the original defendants were administrators and trustees, who, by the nature of their undertaking, were charged with the execution of disinterested and burthensome trusts; and I shall always be extremely averse to hold such characters responsible on slight grounds, or where there is evidence of fair and upright intention. But if the facts necessarily lead to the conclusion, that the administrators have been guilty of gross negligence, or of premeditated and fraudulent concealments and dispositions of the estate of the infant, it will then be equally my duty, however painful the performance of it, to animadvert upon such conduct with a freedom and severity due to truth and justice.

1. The administration of the personal estate of *Hart* was almost exclusively assumed by *Ten Eyck*; and *Van Rensselaer*, though a joint administrator, had little or no concern in it. We will, then, in the first place, examine how far *Ten Eyck* had rendered a just and true account of his administration, from the 15th of *January*, 1789, when letters of administration were granted, to *January*, 1802, when the account of the personal estate, and of the disposition of it, was rendered by the administrators to the Court of Probates.

Ten Eyck says, in his answer, that all the goods and chattels of *Hart*, at the time of his death, so far as the same came to his knowledge, exclusive of *choses in action*, con-

1816.

HART
V.
TEN EYCK.

[* 76]

1816.

HART
v.
TEN EYCK.
[* 77]

sisted of stock on the farm, farming utensils, and household furniture, at *Kingsbury*, in the county of *Washington*, which he enumerates, and which were valued, in the first instance, only at 265 dollars, and which, when sold, produced only 216 *dollars and 62½ cents. To show that this very meagre account of the moveable estate was incorrect and false, the plaintiff has examined several witnesses to prove what goods and chattels were left by *Hart*. *Moses Baxter*, who is mentioned in the inventory, which I shall have occasion to notice hereafter, as an overseer, and which I understand to mean an overseer on the farm, says, that he was acquainted with the farm on which *Hart* lived when he died, and that at the time of his death, in *July*, 1788, he was engaged in merchandizing and superintending his mills; and he enumerates the personal property in farming stock and household furniture, which he left on the farm, to the amount, in value, of 700 dollars, and of which no account is rendered by *Ten Eyck*. He next specifies the lumber which belonged to *Hart*, and which had partly been converted into boards and plank, and lay at his mills, at and after the time of his death, to the amount of about 39,000 boards and plank, and which he values at 4,333 dollars. There was, also, a number of cedar posts and vessel timber, amounting to 310 dollars 42 cents. He next specifies 32 bushels of wheat, which were received after *Hart's* death by *Visscher*, the agent of *Ten Eyck*, and which, in part, at least, he conveyed to *Albany*, by direction of *Ten Eyck*; and he mentions some other minor articles; and no account has been rendered of any of this property by *Ten Eyck*. *Jonathan Jackaways*, another witness on the part of the plaintiff, proves that *Hart* left, at his death, a number of the articles of personal property specified by *Baxter*, such as horses, oxen, young cattle, and household goods, and a large quantity of boards and plank, sawed and piled up at his mills, and a large quantity of hewed timber. He says, also, that *Hart* left dry goods and groceries, but he cannot specify the nature or value. He further proves, that *Rynier Visscher*, who was *Hart's* clerk at the time of his death, was left by *Ten Eyck* at the house *where *Hart* lived, and was authorized, by *Ten Eyck*, to collect the debts, and manage the affairs of the estate; and that *Visscher* did collect debts to a large amount, and pay them over to *Ten Eyck*. It may be observed, in this place, as a fact worthy of notice, that this same *R. Visscher* presented to *Ten Eyck*, in 1793, (5 years after *Hart's* death,) an account of moneys due him, for services as clerk to *Hart*, from 1781, down to the year 1788, to the amount of upwards of 700 dollars, and which account was paid by *Ten Eyck*. A

[* 78]

third witness on this subject is *Adiel Sherwood*, who also proves that *Visscher* was the authorized agent of *Ten Eyck*, in respect to the estate; and he says he knew *Hart*, and knew the farm on which he lived, and that *Hart* was a merchant and farmer, and superintended his mills, and left household furniture, cattle, horses, farming utensils, and a great quantity of boards and plank at his mills, at the time of his death; and he, himself, purchased of *Visscher*, as agent of *Ten Eyck*, a quantity of logs at the mills belonging to *Hart*, and for which he paid 50 dollars to *Visscher*. He says, further, that *Hart* owned, at his death, a quantity of oak timber, lying in *Argyle* and *Kingsbury*, and that he bought of *Ten Eyck* and *Visscher* about 30 dollars worth of timber, and paid them for it. He also refers to a quantity of red cedar at the head of *Lake George*, and which is particularly explained by *Baxter*. A fourth witness on this point is *Samuel Atwood*, who says, that *Hart* was a merchant, and dealt in lumber, and that lumber, consisting of boards and ship plank sawed at *Whitehall*, and belonging to *Hart's* estate, to the amount of 400 dollars, came to the hands of *Ten Eyck*.

Here we have, then, by the testimony of four unimpeached witnesses, a detailed account of personal property left by *Hart*, at the time of his death, to the amount of upwards of 6,000 dollars, and of which no account is rendered by the administrator. The account exhibited contains only *a few trifling articles, scarcely exceeding 200 dollars; and this is said to be all the moveable property that ever came to the possession or knowledge of the administrator. Can it be possible that this assertion is founded in truth? The bulk of this property consisted of lumber and of stock on the farm, which lay open to the eye. An inventory was taken, at the request of *Ten Eyck*, on the farm at *Kingsbury*, on the 11th of *February*, 1789, and the appraisers were *Peter B. Tierce*, and this same *Rynier Visscher*, the former clerk of *Hart*, and the subsequent agent of *Ten Eyck*. Could *Visscher*, who lived with *Hart* at his death, and who had been his clerk for a number of years preceding, have been ignorant of all this mass of property, which is ascertained and established by the witnesses who have been examined? It appears to me to be impossible; and yet he certifies, as a true and perfect inventory of the goods and chattels of *Hart*, exclusive of the notes and bonds, the few old, and, generally, useless articles specified, and amounting, in value, only to 215 dollars. Either the witnesses are not to be believed, or *Rynier Visscher* knew that the inventory which he so certified was grossly defective and false. But *Ten Eyck*, though the inventory was under his own hand,

1816.

HART
V.
TEN EYCK.

[* 79]

1816.

HART
V.
TEN EYCK.

[* 80]

never thought proper to recognize it in the mode, and under the sanction, which the law required. The statute of 1787 had directed that the executors and administrators should make a true and perfect inventory of all the goods and chattels of the deceased, and should cause the same to be indented, and deliver one part to the surrogate, *upon the oath* of the executor or administrator, that the same was just and true. This duty was altogether omitted, and it was still omitted in 1802, when application was made to the Court of Probates for an order to sell the real estate, notwithstanding the act under which the application was made must have reminded the party of his duty; for it expressly declared, that no part of the real estate should be ordered to be sold, until the executors or administrators **shall* have duly made *and filed* an inventory before application for such sale.

The account exhibited by *Ten Eyck* to the Court of Probates is only an account of *moneys received* by him as administrator, and not of all the goods and chattels of *Hart*; and the oath that was administered in that Court, was only that the papers referred to contained a true account of *his transactions*, as administrator. Until the administrators were compelled to answer here to a charge of concealment and fraud, we have no explicit declaration on oath, what were the goods and chattels of *Hart*, which came to their knowledge. In the words of Sir *John Strange*, (*Orr v. Kaines*, 2 *Vesey*, 194.) "the omission to exhibit an inventory, which every executor ought, especially in a deficient estate, was an imputation against him, and which always inclines the Court to bear harder on such an executor."

The omission to file an inventory according to the statute, is a strong circumstance in support of the charge of improper conduct in an administrator.

But there are other and stronger reasons to doubt of the accuracy of *Ten Eyck's* account of the amount of the goods and chattels of *Hart*, which came to his knowledge. His accounts, exhibited under oath to the Court of Probates in 1802, show the extreme carelessness, at least, with which the affairs of his trust were conducted. He had been called upon in 1799, at the instance of *Aaron Hart*, a creditor of the intestate, to disclose the assets which had come to his hands, and the manner in which they had been disposed of. In that answer, he admitted the receipt of sundry sums of money belonging to the estate, and received of different persons, to the amount of more than 300 dollars, which were totally omitted in his subsequent account; and he also omitted the acknowledgment of the receipt of the annual rent of two leases belonging to the estate, and which had been regularly paid to him by *Ralph Schenck*, from the time that he assumed the administration down to the year 1802. These acknowledged omissions, and which were

equally omitted in the account under oath exhibited to the Court of Probates, and in the account under *oath annexed to the answer, may amount, without interest, to upwards of 700 dollars; and such gross inaccuracies (all in his own favor) were supposed, according to a suggestion upon the argument, to have been cured, in a very considerable degree, by a deduction voluntarily made to guard against error, at the bottom of the *debit* side of the account exhibited to the Court of Probates, which is in these words, "to deduction, as per Mr. *Ten Eyck's* agreement, 200l." What *agreement* is here referred to, or with whom such an agreement was made, is utterly unaccountable. But whatever may be the real meaning of the ground of the deduction, such singular inaccuracy in keeping accounts in relation to a trust committed to him by law, deserves the severest reprehension, and must, of itself, very much shake the credit of his accounts at large.

There are not only very strong presumptions arising out of the circumstances which I have detailed, that more of the personal estate of *Hart* must have come to the hands of *Ten Eyck* than he has admitted, but the case affords direct and certain proof of the fact.

Baxter says, that *Hart*, at his death, had, at the head of *Lake George*, a number of cedar posts, which were drawn to *Fort Edward*, by *Pitcher* and *Negus*, both of whom are now dead; and he believes they were owned by *Hart*, and were so drawn by direction of *Ten Eyck*, because he was so informed by *Vischer*, the agent of *Ten Eyck*, now dead; and he knows that the posts were drawn by direction of *Vischer*. He says, further, that in the winter after *Hart's* death, he received a letter from *Ten Eyck*, informing him, there was a quantity of cedar, part of which was suitable for vessel timber, lying at the head of *Lake George*, belonging to the estate of *Hart*, and requested him to carry the same to *Fort Edward*, to be rafted to *Albany*, on the boards and plank, which boards and plank the witness understood *were the same that belonged to *Hart* at his death. He says, the cedar and timber referred to consisted of about 100 garden or fence posts, and about 25 sticks, and that he drew it, and placed it by the side of that drawn by *Pitcher* and *Negus*.

If this letter, referred to by *Baxter*, was lost, the parol proof of its contents was good evidence; and the presumption of its loss is very strong, arising from the lapse of time. It was an order acted upon and executed by the witness. It is coupled with facts. But we have another letter from *Ten Eyck*, relating to the lumber, which is free from any difficulty, for it is an exhibit in the cause, and is of decisive weight. The letter was dated the 11th of *February*, 1790,

1816.

HART
V.
TEN EYCK.
[* 81]

[* 82]

1816.

HART
v.
TEN EYCK.

and directed to *R. Visscher*; in that he says, "I can't learn that the cedar timber of *Hart's* is yet got from the lake—wish you to acquaint *Baxter*, that the cattle ought to work for the estate as well as for him, in drawing saw logs. If he does not intend to ride the cedar, wish you to get some one to do it with the cattle of the farm. You ought to study the interest of the estate a little, and not let the whole go to wreck."

This letter is full of important disclosures. It was observed, by Archdeacon *Paley*, in his *Horæ Paulinæ*, that amidst the obscurities, the silence, or the contradictions of history, if a letter can be found, we regard it as the discovery of a landmark, by which we can correct, adjust, or supply the imperfections and uncertainties of other accounts. We have here conclusive evidence that *Hart* had lumber at *Lake George*, which came to knowledge, and fell under the control of the administrator; and this fact furnishes several necessary inferences, for it shows that the account exhibited by *Ten Eyck* must be untrue, and that the evidence of *Baxter* and *Sherwood*, as to the timber at *Lake George*, was perfectly correct; and it reflects credit and strength upon all the other testimony respecting the lumber. It shows, further, that there were then *cattle on the farm belonging to the estate, and employed in the business of drawing logs. This is in corroboration of the testimony of *Baxter*, that there were eight oxen and two horses left by the intestate, and of which the administrator gives no account. The cattle of the farm, which he says ought to work for the estate, must mean cattle that belonged to *Hart*. These could not have been the "one old horse sold to *R. Visscher* for 6*l.*," and the "two steers sold to *Baxter*," mentioned in the answer as a part of the inventory; for the answer says, that the articles of which an inventory is now given, were, "soon after the granting letters of administration, converted into money;" and, in proof of this, it appears that *George Wray*, the purchaser of the most valuable article sold, is credited with the payment of it, as early as *May*, 1789. The conclusion appears to me inevitable, that the cattle, as well as the timber alluded to in this letter, of *February* 11th, 1790, were goods and chattels of the intestate, which the administrator has thought proper not to account for; and this unexplained omission renders his answer utterly unworthy of credit.

There is also in this letter a gentle rebuke of *Visscher*, as being a careless agent of the estate, and a pretty plain intimation that the assets (whatever they were) were in a course to ruin, either from waste or plunder.

There are other circumstances in the case, which also go to destroy the credit of the answer.

In an estimate of the property of *Hart*, made by *Ten Eyck*, in his own hand, of the date of *July*, 1790, he says, "personal property on the farm will sell for about 100*l*."

What did he mean by this personal property, when he says now, that all the goods and chattels were converted into money *soon after* he administered, and when it appears, by his account, that he did sell to *George Wray* property specified in the inventory, to 28*l*., and received payment in the spring of 1789? He certainly alluded to *other* personal *property than that specified in his inventory, or in the account annexed to his answer, and of course, he alluded to property of which he now omits to render any account. There is another fact still more fatal to any confidence in the account now exhibited. In an account in the hand of *Ten Eyck*, stated to be an account of his, as administrator, with the estate of *Henry Hart*, deceased, the estate is charged, as of the 10th of *March*, 1790, in these words: "Paid for sail cloth and cable for raft, 6*l*. 13*s*. 3*d*." Is not this clear and convincing proof that the lumber mentioned by the witnesses came to the knowledge and possession of *Ten Eyck*, and that he went to this expense to transport it down the *Hudson*? I have not heard of any explanation attempted to be given to these circumstances; and I think the evidence, taken together, not only warrants, but absolutely *demand*s, that *Ten Eyck* should be held to account for all this personal property belonging to *Hart*, which is ascertained and detailed in the case, and of which no account or credit has been rendered, and no explanation has or may be given. It is sufficient, at least, to establish the presumption that it all came to his possession, and to cast upon him the burden of acquitting himself of that presumption, by proof that it did not.

There is another fact that ought not to pass unobserved while we are upon this part of the case. In the account exhibited by *Van Rensselaer*, against the estate of *Hart*, and rendered to the Court of Probates in 1802, he adds, at the foot of the *credit* side of his account, these words: "By 200 cedar posts omitted, 2*s*. — 20*l*." The question naturally arises, When and from whom were these posts received? There is no date or explanation given. It must be presumed that they were received after the death of *Hart*, and came through the hands of *Ten Eyck*, who had charge of all this personal estate.

The conclusion of the examination on the subject of these personal assets, leads to very serious and painful reflections.

*It is most undoubtedly true, that if this personal property

1816.

HART
V.
TEN EYCK.

• [* 84]

[* 85]

1816.

HART
V.
TEN EYCK.

which *Hart* left at his death, and which we have every reason to conclude came to the knowledge and possession of the defendant *Ten Eyck*, had been duly credited as it ought to have been, the estate would not have been insolvent, and there would have been no need of an application to the Court of Probates. There would have been a balance in favor of the estate, even after allowing all the claims that had been presented against it, and all the payments that had been made; allowing even the very suspicious charge of *Rynier Visscher*, for services rendered as clerk to *Hart*, for many years before his death, *without any credit given*, and when the account was not rendered to the administrator until five years after *Hart's* death, and even after allowing the entire account and balance claimed by *Van Rensselaer*. If this be so, what a dreadful responsibility has been incurred by these administrators in the unnecessary sacrifice of the whole real estate of the infant heir?

The account exhibited by *Van Rensselaer*, to the Court of Probates in 1802, and again to this Court, in his answer, is the next subject for examination; and it is with deep regret, I am obliged to say, that a more inaccurate and unreasonable account has rarely fallen under my observation.

It appears, by exhibit 12, that *Hart*, on the 20th May, 1784, by a receipt under his hand, acknowledged to have received of *Van Rensselaer* 1,400 dollars in final settlement notes, and which he promised to pay on demand, and on this receipt there was an endorsement by *Van Rensselaer*, of having received 905 dollars on the 15th April, 1785, which left a balance of 495 dollars due. But what was due? Not 495 Spanish milled dollars, but 495 dollars in *final settlement notes*; and yet he charges them at par, and with interest, though they were probably not then worth, in the market, 3 shillings in the pound. He charges, *also, as prior in order to the note, for *final settlement certificates paid Hart*, in error, 76 dollars, and for *Samuel Gilbert overpaid*, 60 dollars, and for *certificates issued twice to Hart*, to 166 dollars, and for a *certificate lent him* on the 25th May, 1785, to 315 dollars. All these certificates are put down as at par, and interest charged accordingly on their nominal value. It is to be observed, that there is not a particle of proof, out of the charge itself, for any of these items, except the note, and the presumption would naturally be that the *certificates paid in error*, and the *certificates issued twice*, must have been charges existing, if at all, prior in point of time to the note, and must have been adjusted and settled when the note was given.

The mode in which interest is charged on all these certificates, is in this random manner, viz: "Interest to 1791, average about 15 years, at 4 per cent., 271*l.* 3*s.* 4*d.*" This

1816.

HART
v.
TEN Eyck.

was nearly doubling the principal, even at 4 per cent., and it is in this loose mode, without dates or precision. How he could make out a period of 15 years down to 1791, when the first account began in 1784, is to me incomprehensible.

Another charge, in 1796, is as follows: "Paid *John W. Wendell*, hat manufactory, 119l. 6s." So heavy a charge as this ought at least to have been accompanied with some intelligible explanation, if it was unsupported by any voucher. As it now stands, it is absolutely without meaning, in reference to the estate of *Hart*. The same observation applies to some other minor charges, on which I shall not detain myself; but I shall proceed to another charge, in respect to which there is a voucher in evidence. In the account presented to the Court of Probates, there is this charge, as of *August*, 1790: "Paid patent fees, on soldiers' rights, 77l. 6s. 8d., and interest thereon for 5 years, 28l. 11s. 6d." In the same account annexed to the answer, the sums are the same, and the date the same, but the charge is a little varied, and is in these words: "Paid patent *fees and other charges on soldiers' rights, &c." I presume *Van Rensselaer*, when he put in his answer, had discovered the receipt, which he took of the deputy secretary of state, on the 6th of *August*, 1790, and which shows that all the fees which he paid as administrator of *Hart*, on soldiers' rights, was but 24l. 12s. instead of 77l. 6s. 8d. The words, *other charges*, thrown into the last account, to support it, are left to rest on such a vague assertion, without any pretence for support by document or explanation.

[* 87]

If all the charges in this account of *Van Rensselaer*, which are without any proof, are to be rejected, it will reduce the account from 3,470 dollars to a sum less than 1,000 dollars; and instead of a balance of 437 dollars and 50 cents, in his favor, when resort was had to the real estate of *Hart*, there was a debt of, perhaps, 2,000 dollars due from him to the estate, even admitting every other part of the account to be correct.

That those charges in the account which are without proofs are inadmissible, and cannot be upheld by the answer, is a proposition which I consider to be as well settled in law, as it is in reason. But as the counsel for the defendants seem to have entertained a different opinion on this point, and as the question is very material in this cause, in respect to various claims and pretensions on the part of *Van Rensselaer*, I have felt it incumbent on me to look into the authorities on which the proposition is founded.

In *Kirkpatrick and Thrupp v. Love*, (*Amb.* 589.) the plaintiffs had dealings with the defendant, in the way of merchandise, and on a decree for an account both parties

1816.

HART
V.
TEN EyCK.

[* 88]

were to be examined. On taking the account, the plaintiffs admitted the receipt of some goods, and in the same sentence said, they had paid the defendant for them, and the question was, whether they were bound to prove the payment. Lord Ch. *Hardwicke* held not, as they charged and discharged themselves in the same sentence; *but that it would have been otherwise, if the discharge or avoidance had been in a *distinct sentence*.

The rule, as here laid down, is similar to the one which we find declared at law, that if it be sworn on a trial that a defendant confessed a debt, but said, *at the same time*, he had paid it, the confession shall be valid as to the payment, as well as to the debt. This is said to have been so ruled by *Hale*; (*Tri. per Pais*, 363.) and there has been the like decision in the Supreme Court of this state. (*Carver v. Tracy*, 3 *Johns. Rep.* 427.)

In the case in *Ambler*, the parties were examined as *witnesses* against each other, on taking the account; and the credit even of that case seems to be shaken by that of *Talbot v. Rutledge*, which was a little prior in time, and referred to by Mr. *Ambler* in the margin of the other case, and pretty fully reported in 4 *Bro.* 74. In this latter case, the defendant was examined on oath, on taking an account before the master, and he acknowledged the receipt of some moneys, but stated that he had disbursed them at other times, on account of the concern. The master, upon this proof, charged him with the receipt, and put him upon proof of the discharge, and Lord *Hardwicke* confirmed the report.

If these two decisions are correctly reported, I cannot undertake to reconcile them; but neither of them apply to the point how far the *answer* will, of itself, support a matter set up by way of avoidance, or discharge. It appears to me, that there is a clear distinction, as to proof, between the *answer* of the defendant and his examination as a *witness*. At any rate, the question how far the matter set up in the answer can avail the defendant, without proof, is decidedly and rationally settled.

The rule is fully explained in a case before Lord Ch. *Couper*, in 1707, reported in *Gilbert's Law of Evidence*, p. 45. It was the case of a bill by creditors against an executor, for an account of the personal estate. The executor *stated in his answer that the testator left 1,100*l.* in his hands, and that, afterwards, on a settlement with the testator, he gave his bond for 1,000*l.*, and the other 100*l.* was given him by the testator as a gift for his care and trouble. There was no other evidence in the case of the 1,100*l.* having been deposited with the executor. The answer was put in issue, and it was urged that the defendant having charged

Where an
answer is put in
issue, what is

1816.

HART
v.
TEN EXCK.

confessed and
admitted need
not be proved;
but the defend-
ant must prove
what he insists
on by way of
avoidance.

himself, and no testimony appearing, he ought to find credit where he swore in his own discharge. But it was resolved by the Court, that when an answer was put in issue, *what was confessed and admitted by it, need not be proved*; but that the defendant must make out, *by proof*, what was insisted on by way of avoidance. There was, however, this distinction to be observed, that where the defendant admitted a fact, and insisted on a *distinct* fact, by way of avoidance, he must prove it, for he may have admitted the fact under an apprehension that it could be proved, and the admission ought not to profit him, so far as to pass for truth, whatever he says in avoidance. But if the admission and avoidance had consisted of one *single fact*, as if he had said the *testator had given him 100l.*, the whole must be allowed, unless disproved. This case is cited by *Peake*, (*Ev. 36. in notis.*) to show a distinction, on this subject, between the rule at law and equity; and that in chancery one part of an answer may be read against the party without reading the other; and that the plaintiff may select a particular admission, and put the defendant to prove other facts. He preferred, as he said, the rule at law, that if part of an answer is read, it makes the whole answer evidence; and even Lord *Hardwicke*, in one of the cases I have cited, thought the rule of law was to be preferred, provided the Courts of law would not require equal credit to be given to every part of the answer.

On the above doctrine, in the case from *Gilbert*, I have to remark, in the first place, that it is undoubtedly the long *and well-settled rule in chancery, whatever may be thought of its propriety. Lord *H.* says, in the case of *Talbot v. Rulledge*, that if a man admits, by his answer, that he received several sums of money at particular times, and states that he paid away those sums at other times in discharge, he must prove his discharge, otherwise it would be to allow a man to swear for himself, and to be his own witness. But, in the next place, I am satisfied that the rule is perfectly just, and that a contrary doctrine would be pernicious, and render it absolutely dangerous to employ the jurisdiction of this Court, inasmuch as it would enable the defendant to defeat the plaintiff's just demands, by the testimony of his own oath, setting up a discharge or matter in avoidance. Mr. *Evans*, in his notes to *Pothier*, (Vol. 2. 156—8.) has examined this point with great ability. After citing the case before Lord *Cowper*, he says, and says truly, that it is founded upon accurate principles, and in reference to the course of proceeding in chancery. When the answer is put in issue, the defendant must support, by proof, all the facts upon which he means to insist, while the plaintiff may rely upon every fact admitted, which he conceives material,

[* 90]

1816.

HART
V.
TEN EyCK.

without being bound to the admission of any others. But when the answer is offered in evidence at law, no part of it is immediately in issue. It is only parcel of the evidence, and if one side introduce it, the other may insist upon the whole being read; and if read, it does not necessarily follow that it must be wholly admitted as true, or wholly rejected as false. The credit of any, and of every part, is left to the jury, who are not bound to believe equally the whole answer, but may believe what makes against, without believing what makes for, the party who swears in the answer. This rule is applicable to every kind of evidence, and has often been acknowledged by the judges at law. (Lord Mansfield, in *Bremon v. Woodbridge*, Doug. 788. *Chambre, J.*, in *Roe v. Ferrers*, 2 Bos. & Pull. 548.)

[* 91]

*The distinction, therefore, as *Evans* says, is not between Courts of law and equity, but between *pleadings* and *evidence*. If an answer is introduced collaterally, and merely by way of evidence in chancery, it ought to be treated precisely as in a Court of law. On the other hand, if, in a Court of law, the plea confesses the matter in demand, but avoids it by other circumstances, the proof of the avoidance is incumbent on the defendant. The same distinction was lately taken in the case of *Ormond v. Hutchinson*, before Lord Erskine. (13 Vesey, 47.) It was said, that when passages are read from an answer which is repud to, and is not an answer to a mere bill of discovery, they are not read as *evidence*, in the technical sense, but to show what the defendant has *admitted*, and which, therefore, need not be proved. The only explanation necessarily accompanying the rule, is, that you must not stop short with a sentence, so as to garble a single fact, but you must read the answer so as to complete the immediate subject to which the defendant is answering. This is all. It does not apply to *distinct* matter; and the admission of *one fact*, does not establish the assertion of *another*. (a)

[* 92]

While upon this point, it may not be amiss to notice *the

(a) To the cases on the above point, that the answer is not evidence when it sets up matter affirmatively in avoidance or discharge, the following authorities have been added by the *chancellor*, as tending further to show that the doctrine in the text is not only well settled in the *English* jurisprudence, but has been equally recognized in our own.

Sir William Blackstone lays down the rule, in his *Commentaries*, (Vol. 3. 451.) as one of undisputed admission and practice, at that time, (1768,) that the plaintiff in chancery at the hearing, "may read such part of the defendant's answer as he thinks material or convenient," but that the defendant "may not read any part of his answer."

In *Thompson v. Lumbe*, (7 Vesey, 587.) Lord Eldon said, "He was clearly of opinion, a person charged by his answer cannot, by his answer, discharge himself; not even by his examination, (before the master,) unless it is in this way: if the answer on examination states, that upon a particular day he received a sum of money, and paid it over, that may discharge him; but if he

rule, that though one witness against the direct and positive averment of the answer be not sufficient ground for *a decree, yet if that witness be corroborated by circumstances, it will be sufficient. (Lord Thurlow, in *Pember v. Mathers*, 1 Bro. 52.) It has, also, lately been ruled, that the answer containing the denial may also, *in itself*, *contain the circumstances giving greater credit to the witness, sufficient to found a decree against the defendant. (*East India Company v. Donald*, 9 Vesey, 275.)

I have thus, and I trust satisfactorily, shown, that the answer of *Van Rensselaer* is not sufficient to establish any of the charges which he sets up against the estate of *Hart*,

1816.

HART
v.
TEN Eyck.

[* 94]

says, that upon a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge, for it is a different transaction." In *Boardman v. Jackson*, (2 Ball and Beatty, 332.) the general rule was not only admitted by the learned counsel, on each side, but the distinction between pleadings and proof was stated in the manner Mr. Evans has done. The counsel on one side contended the rule in equity to be, that what a defendant admits, the plaintiff need not prove, but that if the defendant insists, by way of avoidance, on any distinct fact, he must by evidence prove it. The counsel, on the other side, on the part of the defendant, admitted, "that where a plaintiff refers to an answer as *constituting part of the pleadings in the cause*, the defendant cannot, by a separate passage of the answer, discharge himself from any admission he may there have made; that he can only do by producing evidence. But when a plaintiff refers to an answer in *another cause*, by way of evidence, he makes the whole answer evidence, and the defendant may then read any part of it in his defence. The same distinction exists, at law, between pleadings and evidence. If a plea confesses a fact, but at the same time avoids it by other circumstances, the defendant must substantiate the avoidance by proof." The Lord Chancellor of Ireland then observed, in giving his opinion, that "It is admitted in argument that where a bill is filed, calling on a defendant to account, and the plaintiff is entitled to answer, if the defendant sets forth in a schedule to his answer an account, charging himself with sums of money, and in another schedule an account of the disbursements of those sums, he cannot, according to the practice of this Court, avail himself of the second schedule to discharge himself in taking the account, although he would be charged on his admissions in the first schedule." He admitted this principle did not apply to documents, and which *formed no part of the pleadings in the cause*, but were offered merely as matter of evidence; nor did it apply where the answer of a party in *another cause* was resorted to as evidence.

The rule admitted in this case was understood and intended to be the rule of the *English* chancery; for none but *English* authorities were referred to, and they were generally the same with those mentioned in the text.

In *Beckworth v. Butler*, (1 Wash. Rep. 224.) a bill was filed in the Court of Chancery, in *Virginia*, against an administrator, for distributive shares of the intestate's estate. The answer, among other things, set up a gift from the intestate to the administrator of a bond, which formed the principal part of the personal estate. This allegation in the answer was not supported by proof, and the chancellor directed the administrator to account for the amount of the bond. The defendant appealed to the Court of Appeals, and the decree was affirmed; and the president, in delivering the opinion of the Court, observed, that "the answer of a defendant in chancery is not evidence where it asserts a right affirmatively, in opposition to the plaintiff's demand. In such a case, he is as much bound to establish it by indifferent testimony, as the plaintiff is to sustain his bill. It would be monstrous indeed, if an executor, when called upon to account, were permitted to swear himself into a title to part of the testator's estate." This same doctrine, and in the language of this very case, was afterwards, in *Paynes v. Coles*, in the

1816.

HART
v.
TEN Eyck.

and that all those which rest upon his answer alone, must, of course, be rejected.

There is another charge in the account of *Van Rensselaer* which may require a more particular attention, and which is in these words: "To 1,000 acres of land furnished *I. Lytle*, pr. obligation, 6s. 6d. 325l."

There is reason to believe that this charge is inaccurate and unjust.

The charge is founded upon a receipt which *Hart* gave to *Isaac Lytle*, the 7th of *October*, 1784, in which he acknowledges to have received of *Lytle* a doctor's right of 1,000 acres of land, and which he promises to manage to the best advantage, for *Lytle*. The testimony of *Lytle* has

same Court of Appeals, (1 *Munf. Rep.* 373.) recognized as correct. *Roane, J.*, said, the rule was "well settled;" and the counsel in support of the defendant, who brought the appeal, did not attempt to question it. The rule is not without equal sanction in our own Courts. In *Bush v. Livingston and Townsend*, (2 *Caines's Cases in Error*, 66.) the counsel on one side (*Benson and Harrison*) contended, that whatever the answer sets up in avoidance, even of that which is admitted in the answer, must be proved, and the answer is no proof of it; and the counsel on the other side (*Riggs and Hoffman*) acknowledged the rule. "As to matter of avoidance being to be proved, that (say they) we do not deny. The nature, however, of an avoidance is to be seen. It is something subsequent, and *dehors* that which is admitted or alleged, as if a debt be acknowledged, but it be added *you released it, or I paid it*; there the release or payment, being matter of avoidance, must be proved." Such prompt and explicit concurrence in opinion between opposite and experienced counsel, is evidence of the general sense of the profession as to the certainty and solidity of the rule. But the case of *Green v. Hart*, (1 *Johns. Rep.* 580.) contains the opinion of the Court of Errors, on the very point discussed in all these cases, and carries the doctrine to its most unrestricted extent. *Hart* had charged in his bill that he paid a full and valuable consideration for the note endorsed to him by *Green*, who, in his answer to this charge and the interrogatory founded upon it, alleged that part of the consideration for endorsing the note was usurious. Mr. Chancellor *Lansing* held, that this allegation of usury was merely in avoidance, and was not sufficient without other proof. On appeal, by *Green*, his counsel admitted, that the answer was not evidence to any collateral matter suggested by way of defence; and the counsel on the other side asserted, that there being an allegation of usury, which was denied by the replication, and being put at issue, it was incumbent on the appellant (the defendant in chancery) to prove it. The decree was affirmed, and Mr. *J. Spencer*, in delivering the unanimous opinion of the Court, said, that "with respect to the first point, it is to be observed, that the respondent was in possession of *Johnson's* note as endorser, and the fact of the absolute endorsement by *Green* was *prima facie* evidence of a full and adequate consideration paid for the note. The respondent was under no necessity of inquiring into it; but he did allege that the consideration was a full and valuable one. This the appellant might have denied; and had it been incumbent on the respondent, he must have proved the allegation, or failed in his suit. The burden of showing that the consideration was illegal or inadequate rested on the appellant. When he goes into a charge of usury, he departs from the question put to him, which admitted only of an affirmative or negative answer; and it was wholly immaterial whether it was the one or the other. I view, therefore, the appellant's answer, charging usury, as insisting on a distinct fact, by way of avoidance. The respondents having replied, and given him an opportunity to prove the fact, and he having failed to do so, his answer is no evidence of the fact. This is a well-established principle in chancery proceedings, and will be found recognized in every treatise on evidence in that Court."

been taken to explain this transaction: he says, that he possessed a right of 1,000 acres of land, issued to Dr. *Willard*, for services rendered by him as a surgeon in the army, and that he delivered it to *Hart*, at the date of the above receipt, to be deposited in the surveyor-general's office, together with a location made by him under the same. That after the death of *Hart*, he attempted to obtain a patent for those lands, and calling on *Van Rensselaer* for assistance, he produced the receipt given by *Hart*. That *Van Rensselaer* said the administrators had sold that right, as supposing it to belong to *Hart*, and he offered to hold himself liable for it; and *Lytle* gave up *Hart's* receipt, and took one from *Van Rensselaer* of the date of the 4th of *March*, 1789, in which *Van Rensselaer* promises to settle with *Lytle*, and mentions *Hart's* receipt as specifying the class-right to have been issued to Dr. *Willard*. That afterwards, in *March*, 1794, he received *of *Van Rensselaer* two deeds, containing, in the whole, 750 acres of land in *St. Lawrence* county, which he received in full for the military class-right above mentioned; and that it was agreed between them, that *Van Rensselaer* should retain the residue, or 250 acres, for his services and expenses in that business.

This statement shows a remarkable inaccuracy in the negotiation between *Lytle* and *Van Rensselaer*. The receipt of *Hart* was for a doctor's right, without designating what doctor, but *Lytle* says it was Dr. *Willard's* right for services rendered by him as a surgeon, and *Van Rensselaer*, in acknowledging *Hart's* receipt from the hands of *Lytle*, says, that the very receipt of *Hart* specified the right to be Dr. *Willard's*. The original receipt, being now produced, contains no such thing. It is simply a doctor's right, and the proof in the cause shows conclusively, that Dr. *Willard's* right never did belong to *Lytle*. It appears, by exhibit XI, that Dr. *Moses Willard* sold his right for 1,000 acres of land, on the 2d of *September*, 1783, to one *Spangler*, and that *Spangler*, on the 8th of *November*, 1783, sold and transferred it to *Hart*, who deposited it in the secretary's office, on the 12th of *October*, 1784, and it was afterwards, by his direction, delivered to *Van Rensselaer*, who located it on the *St. Lawrence*, as I shall hereafter show. We are, then, left in very great uncertainty as to the authenticity and fate of the military class-right received from *Lytle*. It was none of the class-rights with which the *Sacondaga* location was made, for they were all made by *Hart*, long before the date of the receipt in question, and there was no doctor's right among them. In what way it was ever appropriated by *Hart*, or by any other person for his use, does not appear; and there is one item of testimony which would induce us strongly to suspect that

1816.

HART
V.
TEN Eyck

[* 95]

1816.

HART
v.
TEN EYCK.
[* 96]

it was returned to *Lytle*, and that the whole charge is without foundation. In an account in the hand of *Ten Eyck*, (exhibit No. 60,) purporting to be an account of the estate of *Henry Hart* against **Lytle*, there is this singular charge: "To a class-right of 1,000 acres, per *Lytle's* book, 40l." What could this possibly mean, other, than that *Lytle* himself had credited the return of the right in question?

There are, also, some other parts of *Lytle's* testimony that serve to perplex the subject. He says, that when he deposited the *doctor's* right, and which he most mistakingly converts into *Doctor Willard's* right, he delivered, at the same time, a location *made by him under the same*. Why did he not explain when and where he had made that location? He must have known in whose name and on what land it was made; and why did he not go to the surveyor-general's office, to see what had been done under that right and location, before he went to *Van Rensselaer* for assistance? How does it appear that *Van Rensselaer* had already sold that right, as he said he had, when he so promptly assumed to satisfy *Lytle*?

So much inaccuracy and mystery attends this whole transaction, that it is difficult to know where to fix a steady belief.

But admitting the right was never returned to *Lytle*, and was lost, with what equity or justice could *Van Rensselaer* appropriate 250 acres of that right to himself, and yet charge the estate of *Hart* with the whole 1,000 acres, and that too at the price of 6s. 6d. an acre, when it is admitted in the answer, that class-rights were worth but one shilling an acre prior to location, and when *Lytle* himself testifies, that at the time he received the 750 acres from *Van Rensselaer*, he does not believe those lands could have been sold for more than two shillings an acre? Yet, notwithstanding all this, the estate of *Hart* is charged with 1,000 acres furnished *Lytle* at 6s. 6d. an acre!

If any allowance is to be made for the extinguishment of this right, it can only be for its then value as an unlocated class-right, or the value of one shilling per acre.

I have now done with the *debit* side of *Van Rensselaer's* account, and shall proceed to the other, or the *credit* side; *and if I am not mistaken in my views of the testimony, it will be found to be still more objectionable.

A prominent part of the credit relates to what is well understood in the case, by the name of the *Sacondaga* lands. The answer of *Van Rensselaer* admits that in 1787, *Hart* deposited with him a number of class-rights, as a pledge or security for debts due from *Hart* to him, to the amount of about 689l. 9s. 7d. He did not recollect the number of the class-rights, nor in whom they were originally vested, as he

kept no written memorandum; that he afterwards received verbal instructions to manage and dispose of them to the best advantage; that in pursuance of the deposit and instructions, he located in his own name on 3,880 acres, on the *Sacondaga* river, and on the 25th of *May*, 1787, he received a patent for the same. These lands, he says, he afterwards conveyed partly to the order of *Hart*, and partly to different purchasers, and duly credited the estate with the result, without any charge for commissions.

The credit given in *Van Rensselaer's* account, of the proceeds of these lands, is as follows, viz:—

1,497 acres sold at auction, for	£346 4 9
400 do. conveyed to <i>Ten Eyck</i> , and	
750 do. to <i>Wright</i> , in pursuance of	
authority from <i>Hart</i> , without any	
consideration received.	
1,242 acres conveyed to different indi-	
viduals, whom he names, to	515 12 0
<hr/>	<hr/>
3,889 acres	£861 16 9

We will now examine the proofs, to see how far this is a just and true account.

It is in proof (see exhibit No. 10.) that *Hart*, on the 17th of *July*, 1783, filed in the surveyor-general's office, a location for 5,500 acres of land, at or near the *Sacondaga* river, and that the location was founded on military class-rights *or certificates and transfers duly owned by him, and duly delivered into the office; and that, as the right of one of the soldiers failed, the valid class-rights so located on, amounted to 5,000 acres of land. This location was afterwards, on the 19th of *February*, 1787, transferred by *Hart* to *Van Rensselaer*, with authority to *Van Rensselaer* to take out the patent in his own name. This conveyance, as the answer admits, was in trust, by way of security for some debts due to *Van Rensselaer*; and there is a sufficient proof of the trust without the answer, for it is admitted by a certificate of *Van Rensselaer*, of the date of the 21st of *October*, 1788: (see exhibit No. 10;) and it is admitted also, by the acceptance of the order of *Hart*, of the 21st of *February*, 1788, (see exhibit No. 9.) in which *Hart* orders him to convey to *Ten Eyck* 400 acres out of the *Sacondaga* lands, for which he (*Van Rensselaer*) had obtained a patent for him, (*Hart*,) on the 26th of *May*, 1787.

That the lands were conveyed to *Van Rensselaer* in trust, is thus in proof; but that they were conveyed in trust, to pay debts due to him, is without any proof, except the asser-

1816

HART
V.
TEN EYCK.

[* 98]

1816.

HART
v.
TEN EYCK.

tion in the answer; and I doubt much whether the answer is evidence to that point. There was no need of the answer to prove the trust. It is established by regular testimony, and the condition of the trust was not stated in the acknowledgment of it by *Van Rensselaer*, in 1788; and the unqualified performance of the order of *Hart* to convey part of the land to *Ten Eyck*, and the unqualified assumption and performance of the contract of *Hart* to convey a still larger portion of the land to *Wright*, are acts of *Van Rensselaer*, which form very weighty evidence that these lands were held subject, *absolutely*, to the orders of *Hart*, without any such encumbrance upon them. There is no schedule given of the particular debts, or of the nature of them, or when payable, and the answer is extremely loose on the subject; it says only that the debts were *about* such a sum.

[* 99]

**Van Rensselaer* was, undoubtedly, bound to show and establish his debts; his answer is not competent proof. The debts so secured amounted, as he says, to *about* 689*l.* 9*s.* 7*d.*; but if we recur to his account, which contains all his demands against *Hart*, back to the year 1784, it will be seen that there were no debts due when he received the class-rights for 5,000 acres in trust, except upon the certificates, which he charges as paid in error, or paid twice, or lent or included in the balance of the note due; and all these certificates and the balance together, at their nominal price, or par, and with interest on that nominal price from the time charged, and the small draft on *Tapp*, as mentioned in the account, included, will not all, scarcely, exceed 500*l.* at the time the transfers were made. The pretension, therefore, that the class-rights were deposited to secure so large a debt as 689*l.*, is false, even upon the face of his own accounts; and if those claims founded on certificates are reduced down to the real market value of certificates at the time, then, even admitting that they were all duly proved, and admitting even that they were not included in the note, *Van Rensselaer's* debt, when he received the class-rights, could not have exceeded 200 dollars. A more unfounded pretext for wasting all these *Sacandaga* lands could not well have been contrived.

But admitting that the deposit of these class-rights, with authority to sue out a patent, was truly by way of pledge, or mortgage, for the security of a debt, still, I apprehend, that *Van Rensselaer* had no authority to sell those rights, while they remained in their original shape of certificates, without a previous notice to the party to redeem, nor after they were converted into real estate, without first applying to this Court for a decree or order of sale. The title to the *bona fide* purchaser may be good, but a sale without these previ-

ous steps is a breach of trust, for which the trustee must be responsible.

**Van Rensselaer* says, that *soon after* he received the class-rights, *Hart* gave him verbal instructions to *dispose of and manage them* as he should think best. This very loose authority applied strictly to the class-rights only, and could not have followed them after they were changed into real estate, under the authority given in the transfer itself, to take out a patent in *Van Rensselaer's* name. And, whatever might have been the nature or extent of this verbal authority, there is not a particle of proof that any such authority was ever given. We have only the allegation of *Van Rensselaer*, which, of itself, is no evidence to such a fact. Then, by what right were the lands sold, even admitting they were held as security for a debt?

A bill in chancery to redeem stock, bonds, plate, or other securities, or personal property, pledged for the payment of debts, has frequently been sustained. (*Kemp v. Westbrook*, 1 *Vesey*, 278. *Demondary v. Metcalf*, *Prec. in Ch.* 149. *Wanderzer v. Willis*, 3 *Bro.* 21.) But, on the other hand, it seems now to be admitted, (though Lord Ch. *Harcourt* once held otherwise,) that the creditor who holds the stock in mortgage is not bound to wait for a bill of foreclosure and decree of sale, as in the case of a mortgage of land, but may sell on reasonable previous notice to the debtor to redeem. This was so decided finally, in the cases of *Tucker v. Wilson*, (1 *P. Wms.* 161. 1 *Bro. P. C.* 494.) and of *Lockwood v. Ewer*, (2 *Atk.* 303.) The notice to the party, in such cases, is, however, indispensable. This seemed to be conceded in the case of *Tucker v. Wilson*, and has been so held in other cases. (*De Lisle v. Priestman*, *Brown's Pennsylvania Reports*, 176.) It was the rule of the civil law, that a pledge could never be sold, where there was no special agreement to the contrary, except under a judicial sentence; and this appears to be the law, at this day, in many countries in *Europe*; and it was the rule in the old *English* law, in the time of *Glanvil*, (lib. 10. ch. 6. and 8. p. 159. 163.) as I took occasion *once to show in the case of *Lansing and Cortelyou*. (2 *Caines's Cases in Error*, 200.) But if a freehold estate be held by way of mortgage for a debt, then it may be laid down as an invariable rule, that the creditor must first obtain a decree for a sale under a bill of foreclosure. There never was an instance in which the creditor, holding land in pledge, was allowed to sell at his own will and pleasure. It would open a door to the most shameful imposition and abuse.

The defendant *Van Rensselaer* thought proper, however,
VOL. II. 11 81

1816.

HART
V.
TEN EyCK.
[* 100]

A bill may be filed in this Court, to redeem personal property pledged for the payment of a debt.

But the party holding goods in pledge may sell them without a bill of foreclosure after giving reasonable previous notice to the debtor to redeem.

[* 101]

Aliter, in case of a mortgage of real estate, which can never be sold without a bill for foreclosure, and a decree for a sale.

1816.

HART
v.
TEN Eyck.

to sell these *Sacondaga* lands, and the circumstances attending these sales next attract our attention.

He sold 1,497 acres in *August*, 1791, at public auction, in the city of *Albany*, and the auctioneer (Ev. of *A. G. Lansing*, and exhibit No. 11.) says, he has no doubt public notice was given in the city papers. This is all the evidence we have of a notice. The principal purchaser was *Elkanah Watson*; and we find by the testimony of *Alexander St. John*, that the sales were at an enormous undervalue, and that six of the lots, which produced the total sum of 138*l.* 12*s.* 9*d.*, were, within a year thereafter, sold by *Van Rensselaer* for the sum of 274*l.* 10*s.* This fact is decisive proof that most of these sales were merely colorable, and intended only to extinguish the equitable title of *Hart*, by transferring it to himself. The other lots, which were disposed of at private sale, were, generally, sacrificed at less than half of their then value, according to the testimony of the same witness, who had frequently surveyed in the tract, and had lived near it for 20 years. If these lands had been kept and nurtured, until the infant had come to maturity, they would have afforded a large and independent estate to the plaintiff. Instead of this, the whole tract has been swept away on the most groundless pretences, without leaving scarcely "a wreck behind."

[* 102]

"I think there can be no doubt that the plaintiff is entitled to receive from the estate of *Van Rensselaer* an ample indemnity.

The class-rights, on which the *Sacondaga* location was made, entitled the holder to 5,000 acres of land, and to that extent the location was intended to have been made by *Hart*, in *July*, 1783, as appears from the location itself. But the patent which was afterwards taken out by *Van Rensselaer*, was only for 3,880 acres; and a very important question has arisen in the case, whether *Van Rensselaer* be responsible for the 1,120 acres not embraced by the patent, though covered by the class-rights.

Van Rensselaer says, in his answer, that the patent comprehended the quantity of land due for the class-rights which *Hart* had deposited with him; and in his account annexed to the answer, he says, that the 3,880 acres were "equal to class-right certificates received." This answer is shown to be incorrect; for it is incontestably proved that the class-rights deposited amounted to 5,000 acres; yet it may be true, notwithstanding, that the surplus of acres were never patented by *Van Rensselaer*, or came, in any way, to his possession or use. There is a difficulty in accounting for the non-appearance, in any shape, of the unsatisfied part of the class-

rights, and I have not been able to discover, by any thing in the case, the real history or fate of those surplus rights.

All the proof we have on the subject is, that when *Hart* located on the *Sacondaga* lands, in *July*, 1783, he did it in consequence of certificates and transfers then delivered, and which, after rejecting one of the rights as bad, entitled him to locate on 5,000 acres. He then, on the 19th *February*, 1787, transferred these certificates or class-rights, "with the benefit of deposit on the aforesaid lands and premises," to *Van Rensselaer*, with authority to take letters patent "for the premises aforesaid." We have, lastly, the certificate of *Van Rensselaer*, of *October*, 1788, that a grant *for the lands, nearly as described in the location of *Hart*, was obtained for 3,880 acres, and no more, and which he held in trust.

This is all the evidence before me on the subject, and it does not appear to be sufficient to charge *Van Rensselaer* with the surplus acres, because we have nothing but surmise or conjecture to fix upon him the fact of having located at some other time, and upon some other lands, to the amount of the unsatisfied class-rights. Whether they have remained to this day in the surveyor-general's office unlocated, or whether *Van Rensselaer* did, in truth, use them afterwards, for his own purposes, is left in obscurity, without any evidence to guide us. The assignment to *Van Rensselaer* seems, from the language of it, to have been intended to operate only upon the specific location which it mentions, and no doubt with the impression that it fully absorbed the claim founded upon the class-rights to which it referred. I am not certain how far the then existing laws would admit of any further location on different lands to supply the deficiency in the location in question. The act of 11th *May*, 1784, (7th sess. chap. 73.) authorizing locations for bounty lands, only provided for the case of the first location being void. It then allowed a fresh location on other unappropriated lands. But if the location was not void, and only contained a greater or less quantity of acres than the person locating was entitled to, it was the duty of the surveyor-general to reduce or extend the bounds of the tract so located, as the case might require. Whatever might have been the cause, the fact is undoubted, that the patent did not issue for the extent of the rights, but only for 3,880 acres; and I should presume that *Hart* must have known of this fact when he gave the order of *February*, 1788, in favor of *Ten Eyck*, for he refers to the patent by its date.

I think, therefore, it would be unsafe, and perhaps unjust, to hold the estate of *Van Rensselaer* responsible for *any further claim for these class-rights, until more certain and

1816.

HART
V.
TEN EYCK.

[* 103]

[* 104]

1816.

HART
v.
TEN Eyck.

precise testimony can be afforded, or more light shed upon the subject.

Before I leave this part of the subject, it ought, however, to be observed, that if the patent, instead of containing only 3,880 acres, did really contain, as *St. John* testifies, 4,199 acres, *Van Rensselaer* was responsible for that surplus, and it must now be accounted for. Every advantage of that kind belongs to the *cestui que trust*, and not to the trustee.

Another objection to the credit side of *Van Rensselaer's* account, is the total omission to give credit for the proceeds of class-rights, to the amount of 1,200 acres, which came to the use of *Van Rensselaer*, and were by him located in *St. Lawrence* county. It is in evidence that a class-right of *Dr. Moses Willard*, for 1,000 acres, was by him sold to *J. G. Spangle*, and by *Spangle* to *Hart*, and by him deposited in the surveyor-general's office, in *October*, 1784. He also owned and deposited, at the same time, a right for 200 acres, derived from *James Walsworth, jun.* These two rights were, by an order of *Hart* upon the surveyor-general, of the 12th of *June*, 1787, delivered to *Van Rensselaer*; and it would appear by the order, that a location had been made by virtue of them, at *Black creek* in *Washington* county. (See exhibits 9, 10, 11.) This order was deposited, and the rights specified passed to the credit of *Van Rensselaer*, who, at different times, made deposits of documents for location, and located at other times to the amount he was entitled, on the general credit of his deposits, without specifying which of the documents were intended for any particular location. This appears from the testimony of *Simeon De Witt*, who says, that the location made by *Van Rensselaer*, next after the deposit of the above order of *Hart*, was on the 15th of *June*, 1787, (only three days after the date of the order,) for lots 1, 2, 3, 4, 5, and 6, in *Madrid*, in *St. Lawrence* county, containing *3,840 acres, and he believes that the location was partly made on the rights contained in the order. A patent afterwards issued to *Van Rensselaer* for these lots in *Madrid*. The location of *Van Rensselaer* of the above lots, which was dated the 15th, and filed on the 16th of *June*, 1787, does not refer to any specific class-rights, but is stated in the location itself, to be made "in consequence of the transfers and certificates deposited in the office;" and, in my mind, the evidence is sufficient and decisive, that these rights contained in the order were included in the *St. Lawrence* location; and the only question is, whether *Van Rensselaer* received those class-rights as his own rightful property, or in trust for *Hart*.

These rights were vested in *Hart*, and it was incumbent on *Van Rensselaer* to show that they had been transferred

to him. The order was only to deliver them to him, by means of which he became merely the agent or trustee. The surveyor-general says, there is not, in his office, any assignment of these shares to *Van Rensselaer*. There is no other evidence of his claim but this order, and that was a simple order of delivery, and passed no right. We are bound to consider the interest in these class-rights as still remaining in *Hart*, at his death, until *Van Rensselaer's* representatives produce a regular assignment or release, founded on some sufficient consideration. The granting of the patent, afterwards, to *Van Rensselaer*, is by no means satisfactory evidence that a regular transfer had been made, or sufficient to supply the absence of such a document, especially, when it is in proof that no such document is in the surveyor-general's office, where, if it had ever existed, it would have been deposited and preserved. The production of the order which gave a control over the certificates, might have been deemed sufficient evidence of authority to take out the patent; and whether the commissioners of the land office judged correctly or not in giving to the order *that force, cannot be material on the question of right between *Van Rensselaer* and *Hart*. The trust would naturally follow the certificates into the land. That *Van Rensselaer* should have been constituted the mere agent or trustee in this case, is not at all surprising, when we consider the blind and fatal confidence which *Hart*, on all occasions, reposed in him; and it was their course and habit of dealing together, that *Van Rensselaer* should be *Hart's* trustee in his land speculations. This was the case with the *Sacandaga* lands, and, also, with the military bounty lands, as I shall presently show.

Van Rensselaer must therefore be adjudged to have taken and held 1,200 acres in the *St. Lawrence* lands, in trust for *Hart*, whose representatives must now convey those lands to the plaintiff, or account for their value.

Another, and which is the only remaining *item* that I shall at present take notice of, in the credit side of *Van Rensselaer's* account, is in the following words: "By the cost of seven and a half soldiers' land rights, as pr. agreement, 6*l.*, 45*s.*."

There is not a particle of proof of the agreement here referred to; and instead of a credit of 45*l.*, the plaintiff is entitled to follow the rights into the land, and to claim of the representatives of *Van Rensselaer* the land itself, or its value.

Van Rensselaer was a trustee for *Hart* for a large and valuable interest in the military tract, and to understand the nature and extent of this trust, we must recur to facts.

1816.

HART
v.
TEN ETCH.

[* 106]

1816.

HART
v.
TEN EYCK.

[* 107]

It appears by an agreement, under the hands of *Edward Cumpston*, and of *Van Rensselaer* and *Hart*, dated the 5th of June, 1786, (see exhibit No. 13,) that *Van Rensselaer* then had in his hands 63 soldiers' rights of land, purchased by *Hart* and *Cumpston*. That by an agreement between the parties, it was declared, that twelve of those rights belonged to *Cumpston*, 21 of those rights to *Hart*, and the remainder, or 30 rights, belonged to *Van Rensselaer* and **Ten Eyck*. The answer says, that soon after that adjustment, and in the same year, he, *Van Rensselaer*, purchased seven of the 21 rights of *Hart*, at an advance of 20 per cent., and this allegation is the foundation of the credit to which I have referred. But the answer not being, of itself, evidence of such a purchase, and there being no evidence of it in the case, the whole pretence of the purchase must be rejected as destitute of any foundation. *Van Rensselaer* is clearly responsible for these rights; but how to identify them and ascertain their value, is the next and the difficult question. Nothing can be involved in more perplexity than the manner in which this whole trust has been conducted; and if we are not able to extricate the truth, the fault is in the trustee, and the *cestui que trust* must not become the victim of the confusion.

The account says, that seven and a half rights were purchased. The answer says seven; but as 15 rights are admitted to belong to *Hart*, there could not have been more than six rights appropriated by *Van Rensselaer* to himself, under color of a purchase, and he designates 10 lots, out of which he says the seven which he purchased were taken. but he cannot designate which of the 10 were taken. It turns out in proof, (see schedule D. annexed to *Kellogg's Ev.*) that all those 10 specified lots were conveyed by *Cumpston* to *Van Rensselaer*. In such extreme inaccuracy and obscurity is the whole of this transaction involved!

[* 108]

Van Rensselaer has not disclosed which were the 30 military lots reserved to *Ten Eyck* and himself. The answer only specified the 15 lots which fell to *Hart*, and most of them are represented as bad titles. It may be, that the 30 lots which do not appear, were a selection of the best titles out of the 51 rights which belonged to *Hart* and the defendants. *Van Rensselaer* had the control and disposition of all these titles. The answer ought to have contained a full and frank exposition of the whole, so that it might be seen whether there had been a just apportionment *of the good and bad titles. Every intendment is to be made in such a case against the omission. It is in proof, by the testimony of *Edward Cumpston*, that *Van Rensselaer*, *Ten Eyck*, *Hart*, and himself, were, by agreement, jointly and equally concerned in the purchase of these soldiers' rights, and that all

losses by defective titles were to be equally borne. The adjustment of the portion of these titles in the hands of *Van Rensselaer*, in *June*, 1786, did not relate to the quality or identity of the titles, but only to the number that each party was entitled to; and when *Hart* died, the rights were all still remaining in *Van Rensselaer's* possession, without any such discrimination. It was then his bounden duty, in pursuance of the original agreement, and as a faithful trustee, to see that the apportionment was just and equitable, in quality as well as in number, between the 21 rights belonging to *Hart*, and the 30 rights belonging to himself and *Ten Eyck*. He has not furnished us with the means of knowing that this has been the case. We cannot tell which were the six rights that he elected to appropriate to himself, nor can we tell whether the 15 rights which are specified as having belonged to *Hart*, bore a ratable proportion in value to the whole mass from which they were taken. The rule of law and equity is strict and severe on such occasions. If a party having charge of the property of others, so confounds it with his own, that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it. If it be a case of damages, damages are given to the utmost value that the article will bear. (*Armory v. Dalamirie*, 1 Str. 505. *Lupton v. White*, 15 Vesey, 432. 2 Vesey & Beame, 265.)

In order then to restore to the plaintiff his rights, he is entitled to elect six lots out of any belonging to *Van Rensselaer*, derived from the adjustment in 1786; and if none such are to be found, he is entitled as a compensation in *damages to the average value of six military lots of a good quality in a wild state, and with a good title. In order to determine whether the 15 lots which were finally designated as belonging to *Hart*, were fairly apportioned, in respect to quality and title, an inquiry must be made into the whole 51 lots or rights, in reference to these two objects, to the end that the estate of *Van Rensselaer* may be responsible in damages, for any inequality against the plaintiff which may be found to have existed. Though the titles of the 15 lots specified in the answer, were originally conveyed to *Hart*, yet all the other titles might equally have been in him or *Cumpston*, in the first instance, as the purchases were all made by them, though paid for equally and belonging equally to the whole concern.

I have now finished the examination of *Van Rensselaer's* and *Ten Eyck's* account, as exhibited to the Court of Probates, in 1802, when they applied for leave to sell the whole real estate of *Hart*; and it appears to be impossible to resist

1816.

HART
V.
TEN EYCK.

If a person having charge of the property of another, so confounds it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion; and he must distinguish his own property or lose it; and if damages are given against him, it will be to the utmost value of the article.

[* 109]

1816.

HART

V.
TEN EYCK.

the conclusion, that if a just and true account of the debts and credits of *Hart* had been presented, it would have shown, that instead of the estate being insolvent, there was a large balance of several thousand dollars in its favor.

2. The next head of inquiry, is the sale of the real estate, under the order of the Court of Probates.

I have no hesitation in declaring my conviction, that the order of sale was fraudulently procured. The manner in which it was procured and executed, betrays a carelessness so gross, and a departure so palpable from the ordinary habits of just and correct proceeding, that we are warranted to impute to the administrators intentions the most unjust.

[* 119.]

The statement and valuation of the property, as exhibited to the Court of Probates, gave a very unfavorable view of it. It has been shown, by testimony, that the lands in general were extremely undervalued. Thus, for instance, *the lands in *Butlersbury* were valued short of 2,000 dollars, and they are proved to have been worth, at that time, 6,000 dollars. A lot in the *Royal Grant* was valued at 200 dollars, when it was worth 1,600 dollars. Two lots at *Skenesborough* were valued at 1,000 dollars, and were proved to be worth 3,000 dollars. The 15 military lots, which were assigned to *Hart*, were set down without any specification of the town or lot, and in these general terms, "15 military class-rights, 1,000*l*." It seems, as if it had been the predetermined intention of the administrators, not to try the experiment whether part of the property would not raise the requisite funds, but to sweep away, at once, the whole real estate, however widely dispersed or imperfectly known. One single lot, out of the 15 military lots, was worth more, in 1802, than what the administrators thought proper to put down as the value of the whole, and five years before that time, *Ten Eyck* had valued these 15 military class-rights, at a "moderate compensation," as worth 11,250 dollars. (See exhibit No. 4.) But I pass over the subject of the valuation, with applying to the case the solid remark of Lord *Eldon*, (*ex parte Bennett*, 10 *Vesey*, 385.) that "it is the duty of a trustee not to bring the property to sale, until all information has been acquired by him for the benefit of the *cestui que trust*, under circumstances likely to make it yield its utmost value."

The act of 1801, under which the application was made directed that the executor, or administrator, should make just and true account of the personal estate and debts, and present it to the Court; and there was a special *proviso*, that no order for the sale was to be made, until he had duly made and filed his inventory. We have seen what an account was presented, and the *proviso* in the statute was entirely disregarded. The Court was then to direct notice to be

given to all persons interested, to show cause why the real estate, or a part of it, was not to be sold. This order was to be published for four weeks, "in two or more *public newspapers, printed in this state, one of which was to be the paper, if any, published in the county where the administration was granted." The order in this case was made on the 6th of *January*, 1802, and published, and the day assigned for all persons interested to show cause, was the 25th of *February* ensuing. The order for the sale refers to, and describes the essential parts of this order for publication, and further states, that it had been published "for four weeks, successively, in two of the public newspapers printed in this state." So far, it recites a compliance with the very words of the statute; but it stops here, and does not add, "one of which papers was the paper published in the county of *Washington*, where the administration was granted." Why this omission? It is a fact of public notoriety, that there was a weekly paper then published at *Salem*, in *Washington* county, and had existed there for some years preceding. As this is all the proof we have of the notice, and as the order very carefully recites the particulars of the previous notice to a certain extent, and is then silent on another and most interesting particular, we are authorized, by all just reasoning, to conclude that such particulars did not exist. The statute was thus, in two instances, violated, and both of them in respect to an act to be done in the county of *Washington*, where *Hart* died, and where administration was granted, and where he left valuable property in land and mortgages, which were, afterwards, sold at the auction, at a sacrifice.

But to proceed on this subject; the statute directed, that, at the time specified in the notice, or at some other time, the judge was to hear and examine the allegations and proofs of the administrators, and all others interested; and if upon due examination he found the personal estate insufficient, he was to order so much of the real estate to be sold as should be necessary to pay the debts. The order of sale bears date the 20th of *March*, 1802, and states, further, that no person appeared to show cause on the 25th of *February*, and *that on the 20th of *March*, the administrators appearing, the judge proceeded to hear and determine the allegations and proofs *by them produced*; (which consisted only, as we are bound to conclude, of their accounts already noticed;) and he then adjudged that the personal estate was insufficient, and ordered the whole of the real estate to be sold. It is a little singular that this order, which states the appearance of the administrators on the 20th of *March*, is silent as to the appearance of any person on behalf of the infant heir. It does, however, appear by another exhibit, that on this

1816.

HART
V.
TEN ETCK.
[* 111]

[* 112]

1816.

HART

V.
TEN Eyck.

same 20th of *March*, *John C. Cuyler* was appointed guardian of the infant, to appear and take care of his interest in the premises. I should think, however, that his appointment had been too long delayed. The statute in this, as in other particulars, discovers great solicitude for the rights of the infant heirs of the deceased. It says, "*That in all cases where a petition shall be presented by any executors or administrators for the sale of the real estate, &c., the Court should appoint a discreet and substantial freeholder to be guardian, for the sole purpose of appearing for, and taking care of, the interest of the infant, in the proceedings therein.*" Here had been a petition presented, the accounts exhibited, an order for publication passed and executed, a day for appearance given and passed by, and on the very day, and almost *eo instanti*, that the sale was decreed, the guardian is appointed. Surely, this was not an appointment sufficiently *early* to meet the intention of the statute, and to enable him to watch over the regularity and accuracy of all the previous proceedings. A stranger to the case, it cannot be supposed that the guardian could have had due time for examination of the accounts, and of the requisite vouchers, and of the state of the real property, its situation and its value, or could have duly deliberated thereupon, as his new and important trust demanded. If any such examination was had, it must have been in the *hurry and agitation of the moment. It must have been performed in the most superficial and careless manner, or all these singular accounts and proceedings could not have passed without a single criticism or objection. That they did so pass, is evident from the order itself, which states the appearance of the administrators, and no other appearance, and adjudges the balance due to the administrators as claimed by them to the utmost cent.

[* 113]

But we are not left to inference on this point. We have the testimony of the guardian himself, who says, he was appointed at the request of the administrators; that he was never notified to attend the Court of Probates, nor presented with any account or statement whatever, in respect to the estate or the administrators; that he never made any examination of the accounts or of the estate, and never paid any attention to the proceedings of the Court in relation to the subject, because, he says, he was given to understand that he was to incur no responsibility, and to be at no trouble in the business.

In this way were all the salutary provisions of the statute, anxiously made to guard the rights of infants from invasion and fraud, disregarded and "set at nought." It is difficult to contemplate such a case without the strongest emotions. It was a perversion of the regular administration of justice; 90

and the principles of this Court and the safety of private right require that it should be publicly known, that such conduct is not to be endured. I do not mean, however, to implicate the moral character of the judge. I am perfectly sensible, that in the course of judicial business, Courts cannot be responsible for the order and regularity of proceedings. The parties always take these things at their peril. The Court usually waits until some point or some objection is raised for decision, and presumes every thing correct, until the contrary be shown. The judge, in this case, no doubt, took the accounts upon the party's oath, *without further inquiry, as no objection appeared, and he certainly slumbered as to the appointment of a guardian. But if the Court of Probates was wanting in vigilance, the party was wanting in duty. It was the duty of the administrators, in this case, to see that their accounts were correct; that an inventory was filed; that publication of the order to show cause was duly made; that a guardian was timely appointed; and that he was duly notified of the proceedings, and of the time and place to show cause. Nothing of this kind took place, and the omission affords just ground to infer a deliberate design in the administrators to stifle all inquiry.

The order for the sale of the real estate having been obtained, the administrators gave four weeks' notice, in one of the *Albany* newspapers, of the sale to take place at *Albany*, on the 4th of *May*, 1802. This was the only notice that was given, though the real estate of *Hart* lay in the counties of *Washington*, *Schoharie*, *Montgomery*, and the then county of *Onondaga*, as well as in the city and county of *Albany*. The ordinary sagacity which a man applies to his own private concerns would have discerned that such a notice was insufficient to bring home the knowledge of the sale to the inhabitants of those counties, who might be acquainted with the lands, and wished to be concerned in the purchase. We know that a Mr. *Stewart* had many years before expressed a wish to buy the *Skenesborough* lots, and offered security. (See *McKinley's* letter, exhibit No. 3.) Nor was this all. The form of the notice was still more defective. Instead of giving any information, even in what counties the lands lay, still less of any description of the particular situation, nature, or quality of the lands, the notice was only that "all the real estate whereof *Henry Hart*, late of the town of *Kingsbury*, in the county of *Washington*, died seised, would be exposed to sale at auction, at the *Tontine Coffee-house*, at *Albany*, on the 4th of *May*." I do think that this notice was, in itself, a breach of trust. It was exposing the property to *extreme jeopardy. If information did, in fact, reach any of the inhabitants of the

1816.

HART
V.
TEN EYCK.

[* 114]

[* 115]

1816.

HART
v.
TEN EYCK.

counties, accompanied with an understanding of the actual property to be sold, it was owing to some casualty or good fortune, not imputable to the notice itself. It is surprising that the sacrifice was not greater. That very advantageous speculations upon the property were made is proved beyond all contradiction. I shall not go into the particulars. There were several hundred dollars lost to the estate, on the sale of three bonds perfectly secured by mortgage; and the purchaser was the son of *Ten Eyck*, who observed, some days before the sale, that he thought a speculation might be made. There were enormous losses on the sale of the property at *Skenesborough*, *Kingsbury Royal Grant*, and *Butlersbury*. The son of *Ten Eyck*, who acted, part of the time, as auctioneer, expressed his dissatisfaction, and even disgust, at some parts of the sacrifice. The sales were adjourned to the 12th of *May*, and a fresh notice was given, specifying the military lots to be sold, but this notice was not published in the papers until the day preceding the sale, and the property specified therein was sold, as on the former day, at the same enormous undervalue. Seven military lots produced only the sum of sixteen hundred and fifty dollars.

I am not forgetful of what was said upon the argument, as to the obscurity and imperfection of these military titles. But why were they hurried to market on such defective or short notice, and before the state of the titles had been skilfully examined and accurately ascertained? It was the duty of the administrators to have caused the titles to have been previously explored. They had all the means of knowledge. They were concerned in the original purchases, in 1783, or early in 1784, and *Van Rensselaer* was afterwards made the depository of a great number of military titles, belonging to him, *Ten Eyck*, and *Hart*, and from which he had, at his own pleasure, selected the titles now exposed to sale. There never was a case in which the duty was more clear and pressing on the trustee, to understand the title he was to sell, and not to expose it as clouded and doubtful, to the hazard of speculation. There never was a case, in all the annals of our Courts, surrounded with so many circumstances to show that the property was rashly and wantonly devoted to destruction. There can be no doubt, therefore, from every view of the transaction, that the administrators must answer in damages for all the loss sustained by this unnecessary and unjust sale of the real estate.

3. The last point which remains to be considered, is in respect to the rule or measure of damages.

The charges which have been made out against the defendants are all *torts* and breaches of trust. They differ essentially from cases of damage founded on breaches of

[* 116]

If an administrator exhibit an untrue account of the personal estate of the intestate, to the Court of Probates, and thereby fraudulently obtains an order for the sale of the real estate, he must not only account for the personal effects omitted in his statement, but is answerable for the real estate sold.

contract. Here has been a continued series of bad faith, and it is requisite to the character of public justice, and for example's sake, that the injured party should be completely indemnified, and that the other should answer for all the consequential damages resulting from the fraud. This is a fundamental principle in sound jurisprudence. (*Kaimes's Eq.* vol. 1. p. 97.) The civil law and the *French* law declared this to be the rule; (1 *Domat.* b. 3. tit. 5. § 2. No. 8. p. 407. 409. 411. 426.) and it is easy to illustrate it by cases in the *English* Courts.

In an action of trover at law, for the conversion of a chattel, it is admitted, that the jury may give special damages beyond the original value of the chattel. (*Fisher v. Prince*, 3 *Burr.* 1363. *Whitten v. Fulter*, 2 *Black. Rep.* 902.) In the case of *Ivie v. Ivie*, (1 *Atk.* 429.) the defendant was charged with a breach of trust, in concurring in the sale of an annuity to the plaintiff's prejudice. Lord *Hardwicke* said, that where a trustee had, in a corrupt or unfair manner, been guilty of a breach of trust, the Court would sometimes compel the trustee to make satisfaction to the utmost. But as the defendant in that case had not acted with unfair motives, he only decreed, that he should, at his own charge, replace the stock by purchasing another annuity of the like nature and value. Indeed, it is a settled principle in this Court, that where a trustee sells stock contrary to his trust, the *cestui que trust* is entitled, at his election, to have the stock replaced, or the produce of it, with the highest interest. (*Bostock v. Blackeney*, 2 *Bro.* 653. *Buller, J.*, *Pocock v. Reddington*, 5 *Vesey*, 800, and *Long v. Stewart*, note *ib.*)

In the application of these principles, we are authorized to say, that where the land in which the plaintiff has an equitable title, exists in the representatives of *Van Rensselaer*, it ought to be conveyed. But where the land has been sold, as in some cases, by *Van Rensselaer* alone, and in others, by the administrators, under the orders of the Court of Probates, they must answer for the value, not as it existed at the time of the sale, for that would not be an indemnity, and would be too great an indulgence to fraudulent breaches of trust, but for the value of the land as it existed at the commencement of the suit, if not at the time of taking the account by the master. I have rather preferred the era of the filing of the bill, as sufficient to afford an indemnity, though I observe the Courts of law, even on contracts to replace stock, have directed the jury to assess damages, to the price of stock at the day of trial, if the market price of it had risen in the mean time. (*Shepherd v. Johnson*, 2 *East.* 211. *McArthur v. Seaforth*, 2 *Taunton*, 257.) The

1816.

HART
v.
TEN Eyck.

And that according to the value of such real estate, at the time of filing the bill against him.

[* 117]

1816.

HART

v.
TEN EYCK.

[* 118]

plaintiff cannot be accused of any unreasonable delay in bringing his suit. His infancy must have continued to within two or three years of the filing of the bill, and that time was short enough for a young heir, deprived of all resources, to seek redress by pacific means; and those failing, to prepare for such an arduous undertaking as a suit of this magnitude. When the suit was brought, he cannot be supposed to have asked for more than the property itself, or its then equivalent in *value. That value, with the interest on it down to this time, will give the indemnity sought for.

The principles of the decree, as extracted from this opinion, will, accordingly, be to the following effect:—

1. That *Ten Eyck* be charged for all the goods and chattels of *Hart*, (including lumber,) not contained in the inventory, identified and proved by the testimony already taken in the cause, or which may hereafter be given before the master, to have belonged to *Hart* at the time of his death, and which the said defendant shall not show affirmatively, by proof, to have been lost, or otherwise not to have come to his possession without his default.

2. That he be charged with the following debts, specified in his account of the debts due to the estate of *Hart*, unless he can discharge himself, by proof, as aforesaid, viz:—

<i>John Doty,</i>	£	7	5	5
<i>Henderson & Waites,</i>		11	13	4
<i>Nicholas Van Rensselaer,</i>			8	3
<i>Bloon,</i>			8	0
<i>Micajah Ellicott,</i>		1	12	0
<i>Henry Sherman,</i>		1	3	0
<hr/>				
	£	22	10	0

3. That he be charged with the moneys admitted to have been received by him in the account annexed to his answer, filed in the suit of *Aaron Hart*, in *September, 1799*, and not credited in the account annexed to his answer in this suit.

4. That he be charged with all the rents proved to have been received by him, and not credited in his account in this Court, and particularly with the rents received from *Ralph Schenck*, in wheat, from 1789 to 1802, at the market value, when received.

[* 119]

*5. That he be charged with interest on all the goods and chattels for which he shall be charged as aforesaid, to be computed from the first of *February, 1790*, on the then value; and with interest on all the moneys and wheat for which he shall be charged as aforesaid, from the time they were respectively received.

6. That the account between *Van Rensselaer* and the estate of *Hart* be stated anew, and corrected in the manner following, that is to say, that all the charges contained in the *debit* side of his account annexed to the answer, and not supported by competent and sufficient proof out of the answer, be disallowed; and that those charges in the same, which are supported by written or other proof, be allowed to the extent of such proof, and no further; that the balance due on the note of the 20th of *May*, 1784, given for final settlement notes, be liquidated and reduced to the market value, in gold and silver, of such notes, on the 15th of *April*, 1785, when the balance due thereon was struck; that the charges for lands furnished *Isaac Lytle* be reduced to the sum of 125 dollars, and to be considered as paid on the 4th of *March*, 1789, when *Van Rensselaer* received the certificate; that the final settlement certificates mentioned on the *credit* side of that account, as having been received in 1791, be credited at their real value at that time; that the credits for the $7\frac{1}{2}$ soldiers' rights, and upon the sales of the *Sacondaga* lands, be wholly omitted; and that the representatives of *Van Rensselaer* be charged, in the account so to be adjusted, with the moneys received by him on the proceeds of the sales of the auction, in 1802; that the balance, if any, that shall be found upon such adjustment to exist against *Van Rensselaer*, be paid by the defendants, who are his representatives, with interest thereon, from the 1st of *June*, 1802.

1816.

HART
V.
TEN EYCK

7. That *Van Rensselaer* be charged with the value of the lands contained in the *Sacondaga* patent of the 25th of *May*, 1787, and not conveyed by him to *Ten Eyck* and **Wright*, in pursuance of the orders of *Hart*, and including the surplus of acres, if any there be, in the patent, beyond the 3,880 acres specified in the patent, and that the value be ascertained as the same lands are worth, without improvements, in *September*, 1808, and that his estate be also charged with interest on that value from that time.

[* 120]

8. That the representatives of *Van Rensselaer* convey to the plaintiff, in fee, 1,200 acres of land, held in his name, at his death, in lots 1, 2, 3, 4, 5 and 6, in *Madrid*, in the county of *St. Lawrence*, to be conveyed as so much land in common with the other lands owned by *Van Rensselaer*, at his death; but if a good title to those lands cannot now be given by the representatives of *Van Rensselaer*, that they then account to the plaintiff for the value of an undivided right to twelve hundred acres in those lots, in *September*, 1808, with interest from that time.

9. That the plaintiff elect six lots out of the military lots held by *Van Rensselaer*, on the 5th of *June*, 1786, as derived

1816

HART
v.
TEN EYCK

from purchases made by the intestate, or *Edward Cumpston*; and that the representatives of *Van Rensselaer* convey the lots so elected to the plaintiff in fee; but if no good titles to such lots can now be given by his representatives, or the same cannot clearly be ascertained for the purpose aforesaid, that the said representatives then pay to the plaintiff the average value in *September, 1808*, with interest from that time, of six military lots, of good quality, in a wild state, and with a good title.

10. That an inquiry be made, by the master, into the quality and title of each of the 51 lots, for which the rights, or transfers, were held by *Van Rensselaer* on the 5th of *June, 1786*, so far as the same can now be ascertained.

[* 121] 11. That *Ten Eyck*, and the representatives of *Van Rensselaer*, be charged with the difference between the price which the lands sold by them, at auction, in *May, 1802*, actually produced, and the value of the same lands in *September, 1808*, independent of any improvements *made between *May, 1802*, and *September, 1808*, together with interest on that value, from the time; and that the said defendants be allowed a ratable deduction from this charge, from such parts (if any) of the military lands then sold, as they can show, by satisfactory proof, did not belong to the intestate at his death.

12. That the defendants be charged with the difference between the price which the bonds and mortgages, mentioned in the pleadings, produced at the auction, in *May, 1802*, and the real value of the same at that time, having reference to the rate of interest and the time of payment; and that they be charged with interest on such difference from that time.

13. That an inquiry be made. whether *Van Rensselaer* obtained any, and what, grants of land for all, or any part, of the surplus class-right of 1,120 acres, beyond the 3,880 acres in the *Sacondaga* patent, and whether the representatives of *Van Rensselaer* can make a good title therefor; and if not, then what was the value of the lands so obtained for these surplus rights in *September, 1808*, with interest on that value from that time.

14. That a reference be made to a master, to take and state an account between the parties, and to make inquiries on the principles of this decree; and that all the testimony and exhibits in the cause may be used as testimony on such reference, together with such further testimony as the parties, or either of them, may think proper to furnish; and that the parties, and the master, have leave to apply, at any time during the progress of the reference, for further direc-

tions ; and that the question of costs, and all further questions, be, in the mean time, reserved. (a)

1816.

HAWLEY
v.
CLOWES.

(a) The defendants entered an appeal from this decree ; and the Court for the Correction of Errors, by its decree of the 5th of April, 1817, altered and modified the decree of the chancellor in several essential particulars.

* HAWLEY against CLOWES.

[* 122]

An injunction to stay waste between tenants in common lies, in special cases ; as to prevent one tenant in common, in possession, from cutting down timber growing on the land, and not wanted for the necessary use of the farm.

THE bill prayed for a partition of land, and for an injunction to stay waste in cutting down and carrying away the timber. It stated, that the plaintiff and defendant owned the land as tenants in common, in equal undivided moieties, and that the defendant is in the actual possession of the whole by himself, or his tenant, and is cutting down the timber, and threatening to persevere ; but admitted the plaintiff's title as tenant in common.

February 6th.

An injunction was granted on filing the bill, which was sworn to.

The defendant, in proper person, moved to dissolve the injunction, on the ground that an injunction to stay waste between tenants in common will not lie, and cited *Goodwyn v. Spray*, (*Dickens*, 667.) in 1786, and *Smallman v. Onions*, (3 Bro. 621.) But if the motion could not be granted *in toto*, he then moved that he might have liberty to carry off the wood already cut before the service of the process.

No answer was put in.

Buel, contra.

THE CHANCELLOR. The injunction must be modified, so as to confine it to timber then standing and growing on the premises, and not wanted for the necessary use of the farm. The last-cited case admitted the authority of the *Court to grant the writ between tenants in common, in special cases, as where the defendant was sworn to be insol-

Injunction to stay waste between tenants in common, in certain cases.

[* 123]

1816.

HAWLEY
v.
CLOWES.

vent; and Lord *Eldon*, in the subsequent cases of *Hole v. Thomas*, (7 *Vesey*, 589.) and of *Tworl v. Tworl*, (16 *Vesey*, 128.) admitted the propriety and necessity of this power in the Court, between tenants in common, where the waste was destructive to the estate, and not within the usual and legitimate exercise of enjoyment. The case, therefore, of the exercise of this power, must rest in sound discretion; it is not a case of a want of jurisdiction. Here is a bill for partition, and pending the suit it appears to be extremely fit that the tenant in common in possession, should not be permitted to strip the land of its timber. It is destructive, in many cases, of the value of the estate, and not consistent with a prudent enjoyment by the real owner. The statute of *W. 2. 13 Edw. I. c. 22.* (sess. 10. ch. 6.) gives an action of waste by one tenant in common against another. It is, therefore, an injury recognized by law, and the remedy by injunction is applicable to every species of waste, it being to prevent a known and certain injury; this remedy is peculiarly proper and appropriate pending a bill for partition of the very land. It comes within the equity of the statute, (of sess. 10. ch. 50. s. 29.) which prohibits a defendant, pending a suit for the land, from making waste, and directs the Court, where the suit is pending, to prevent it. The injunction, therefore, under the above modification, must be continued until answer, and further order.

Injunction continued.

1816.

IN THE MAT-
TER OF
PERKINS.

* In the matter of DANIEL PERKINS, a lunatic.

An inquisition of lunacy, taken abroad, or in another state, is not sufficient to authorize a sale of the lunatic's estate, for his maintenance; but it is sufficient to warrant the issuing a new commission here, and may, perhaps, be sufficient ground or evidence to warrant an inquisition here, on such new commission.

PETITION of *Jonathan Perkins*, stating that *Daniel Perkins*, now of *Bridgewater*, in *Massachusetts*, had been there duly found, by inquisition, a lunatic, and that the petitioner had, by the competent authority in that state, been appointed guardian of the person and estate of the lunatic. That the lunatic had no property, except about 70 acres of land lying in *Madison* county, in this state, and worth about 1,000 dollars, and that the same yielded very insufficient rents and profits; and that it was necessary, and he, therefore, prayed, that the same might be sold for the expense and maintenance of the lunatic. February 8th.

THE CHANCELLOR. It is necessary that a commission of lunacy issue here; the inquisition abroad was not sufficient to authorize a sale of the real estate. (1 *Schoales & Lefroy*, 307.) The powers given by the statute (sess. 24. ch. 30.) apply only to cases arising under the authority of this Court. Perhaps the inquisition in *Massachusetts* may be sufficient ground or evidence to warrant the inquisition here, according to what was said in *Gillam's case*, (2 *Vesey*, jun. 587.) It is, at least, sufficient to warrant the issuing a commission; and there is no doubt, from the case *ex parte Southcote*, (*Amb.* 109.) that a commission of lunacy may issue against a person resident abroad.

A commission was, accordingly, issued, and was executed at *Albany*, and the petitioner appointed committee of the *person and estate of the lunatic, on giving security to the value of the real estate in the county of *Madison*, and he was afterwards, by an order of the Court, founded on petition and affidavit, authorized to sell the real estate, and directed to invest the proceeds, &c. for the maintenance of the lunatic.

[* 125]

1816.

TICE
v.
ANNIN.

TICE *against* ANNIN.ANNIN *against* AKIN and TICE.

If a mortgagee sells the equity of redemption, by execution at law, to satisfy the mortgage debt, and then proceeds at law against the mortgagor's person or other property, to obtain the residue of the debt, unsatisfied by the sale of the equity of redemption, or if the whole debt is satisfied by such sale, he must assign over to the mortgagor the bond and mortgage, to enable him to compel the purchaser of the equity of redemption to refund him the debt, out of the land mortgaged.

But if the mortgagee, by assigning the whole debt and mortgage to the purchaser of the equity of redemption, has put it out of his power to assign them to the mortgagor, the debt will be extinguished in the hands of the purchaser. The mortgagor, however, will not be entitled to receive the purchase money, for the purchaser will be considered as having bought the land for the price paid, subject to all the residue of the debt secured by the mortgage, beyond what was extinguished by that purchase money.

This Court will restrain a mortgagee from proceeding at law to sell the equity of redemption; or put him to his election, either to proceed directly on his mortgage, or to seek other property, (where the rights of creditors do not interfere,) or the person of the debtor, for the satisfaction of the debt.

February 10th.

[* 126]

THE *original* bill was filed on the 21st of *June*, 1810, to foreclose a mortgage given by the defendant *Annin*, on the 1st of *August*, 1808, to secure the payment of three bonds, for 500 dollars each. The first bond had been paid; the principal and interest on the second became due the 21st of *May*, 1810; and the principal of the third was payable on the 21st of *May*, 1811, with interest. The *two last bonds were alleged to have become forfeited by reason of the non-payment of the principal and interest of the one, and of the annual interest of the other. After the bill was filed, and before the defendant answered, the defendant offered to pay the second bond, with the costs, but the plaintiff refused to accept the offer, unless the third bond was also paid; though the interest thereon was not made payable at any particular time, or before the principal.

The *cross* bill, which was filed on the 23d of *December*, 1811, stated, that when the *original* bill was filed, neither principal nor interest was due on the third bond. That in *September*, 1810, before the answer in the *original* suit, the defendant *Tice* brought an action at law on the second bond, and obtained judgment in *August*, 1811, on which he issued execution, and sold the mortgaged premises to the defendant *Akin*, subject to the mortgage, for 310 dollars.

That in *June* or *July*, 1811, *Tice* also brought an action at law on the third bond, and recovered judgment. That the sheriff executed a conveyance to *Akin*, the purchaser under the execution, and received the 310 dollars, which he paid to *Tice*. *Akin*, under his deed, brought an action of ejectment at law against *Annin*, and recovered possession of the premises; that the sale being subject to the mortgage, &c., *A.* ought to discharge the plaintiff *Annin*, and pay to her the 310 dollars, and cancel the bonds, &c. The plaintiff prayed an injunction, &c.

Akin and *Tice* denied that the premises were sold by the sheriff subject to the bonds and mortgage, but *Akin* admitted, that the sheriff, at the time of sale, stated, though not to him particularly, the amount to be raised on the execution, and that there was a mortgage on the premises, besides the judgment, for 700 dollars; but that the sheriff did not intimate that the money, on the sale, was to be paid to *Annin*, nor that *Akin* was to satisfy *Tice* for the amount of the execution and the mortgage; that *Tice* sold and assigned *to him all his interest in the two bonds, judgments, mortgages, suits, &c.; so that he united, in himself, the legal estate, by assignment from the mortgagee, and the equity of redemption, by purchase at the sheriff's sale, under the execution.

It was alleged, on the part of *Tice* and *Akin*, that the purchase from the sheriff was made subject to the charge of the third bond only; and, on the part of *Annin*, that *Akin* purchased, subject to the whole mortgage debt. The testimony on this point was, in some degree, contradictory, as to what was the declared understanding of the parties at the time of the sale by the sheriff; but from the view taken of the case by the Court, it is not necessary to detail the evidence on this point.

Annin alleged that *Tice*, by quitting his bill of foreclosure, and proceeding at law to a sale of the equity of redemption, under the judgment and execution, was thereby bound to look exclusively to the land for all his debt.

Akin said he was willing to relinquish his right to the land, on receiving the principal and interest due on the bonds, and the costs of the several suits; and to accept an order for 500 dollars on *D. Delavan*, mentioned in the pleadings, as so much payment.

Munro, for *Tice* and *Akin*.

Riggs, for *Annin*.

THE CHANCELLOR. These causes were brought to a

1816.

TICE
V.
ANNIN.

[* 127]

1816.

TICE
V.
ANNIN.

[* 128]

hearing together, and they relate to one and the same transaction.

When the cross bill was filed, there was then pending the judgment and execution at law on the second bond, on which there was a credit of \$10 dollars levied by the sale of the equity of redemption; and there was also pending *the suit at law on the third bond, and an ejectment suit at law by *Akin*, the purchaser, and the original bill in this Court, and which was then at issue. The questions arising out of this state of things, are full of embarrassment and difficulty.

If a judgment creditor, *other than the mortgagee*, sells the equity of redemption, the mortgagor reaps the benefit of that equity, by having it applied towards the payment of his other debts, and the mortgage debt remains, without any confusion, as a distinct and separate encumbrance; and if the mortgagee, in such a case, should elect to proceed against the original debtor at law, instead of seeking to foreclose his mortgage, and should endeavor to collect his money out of other property of the mortgagor, this Court must either stay such a proceeding, or compel him, upon payment, to assign over his debt and security to his debtor, so as to enable the debtor to indemnify himself out of the mortgaged premises. The one course or the other would be indispensable to prevent the purchaser of the equity from obtaining and holding the whole interest in the land, when he purchased, and paid only the value of, the equity of redemption. If the mortgagee himself, as in the present case, sells the equity of redemption by execution at law, to satisfy the very debt for which the mortgage was taken, and he then proceeds at law against the mortgagor's person, or other property, for the residue of the debt unsatisfied by the sale of the equity, or if the whole debt was satisfied by the sale of the equity, the same consequence must follow. He must, at all events, on being paid, assign over to the mortgagor the bonds and mortgage, to enable him to compel the purchaser of the equity to refund him the debt out of the land charged. If, however, the mortgagee, as in this case, has put it out of his power to assign, by placing the whole debt and security in the hands of the purchaser, a new and greater difficulty arises.

[* 129]

But if the mortgagee cannot, in such case, assign over the debt and security, the purchaser of the equity of redemption will be deemed as

*To allow the purchaser to go on and compel the mortgagor to pay the mortgage debt to him, and then to compel him to assign over the mortgage to the mortgagor, so as to enable him to recover the money back again, would be an idle and absurd proceeding. There seems to be no other alternative, but to consider the debt as extinguished in the hands of the purchaser. He purchased only the equity of redemption, and, of course, subject to the mortgage debt,

and his purchase of that debt was nothing more than an extinguishment of the encumbrance upon his land.

I do not feel myself at liberty to go so far as to say, that the plaintiff in the cross bill is entitled to the 310 dollars, for this would be rendering the whole suit and sale at law, by the mortgagee, a mere farce. The sense of the thing (if indeed there be any good sense in allowing the mortgagee himself to proceed and sell the equity, by execution at law, without proceeding on his pledge) is, that the purchaser, *Akin*, bought the land for 310 dollars, *subject to all the residue of the debt secured by the mortgage, beyond what was extinguished by that purchase money.* Even this point is attended with great perplexity. Unless the purchaser bids more than the whole amount of the debt charged on the land, he, in fact, gives nothing for the equity. He obtains the entire interest in the land, merely for the amount of the encumbrance. Thus the debt, as in this case, may be 1,200 dollars. He bids 310 dollars for the equity of redemption, and by discharging the residue of the debt, or 890 dollars, he acquires an unshaken title. If the equity of redemption be of any value, then the mortgagor is, by that operation, divested of that equity, without any consideration. So, if the mortgagee himself purchase in the equity at the sheriff's sale, he never bids beyond the amount of his debt, and if he can hold the land against the mortgagor, by uniting in this way the legal and equitable titles, he will have acquired it for the price of his debt, and no more. The equity of redemption is absolutely sacrificed.

*The true and only remedy for all this mischief is, to prevent such sales; and I think I shall be inclined, if the case should arise hereafter, to prohibit the mortgagee from proceeding at law to sell the equity of redemption. He ought, in every case, to be put to his election to proceed directly on the mortgage, or else to seek other property, (if the rights of other creditors do not interpose,) or the person of the debtor, to obtain satisfaction for his debt. I see no other way to prevent a sacrifice of the interest of the mortgagor; and it is manifestly equitable, that the mortgagee be compelled to deal with his security, so as not to work injustice.

To compel the payment over to *Annin* of the 310 dollars, would be increasing, by so much, the price of the land to *Akin*; and perhaps would be charging him with a greater price than he intended, or would have been willing to give for the land, or, perhaps, than it was worth. As the case stands, I cannot interfere further than I have suggested. I am accordingly of opinion, that the original bill be dismissed with costs, to be paid by the plaintiff. The plaintiff went on at his own peril, after *September*, 1810, when the amount

1816.

TICK
V.
ANNIN.

having purchased subject to the debt beyond what is extinguished by the purchase money.

[* 130]

A mortgagee ought to make his election either to proceed directly, on his mortgage, or to seek other property of the mortgagor; he ought not to sell the equity of redemption by execution at law.

1816.

PECK
v.
ELLIS.

of the second bond and costs were refused ; and as he, after that time, took another remedy by an action at law, and has since disabled himself from proceeding by assigning over the mortgage to *Akin*, and as *Akin* cannot proceed, since he unites the rights both of mortgagor and mortgagee, the suit is at an end by the act of the party who brought it. I am further of opinion, as to the cross bill, that a perpetual injunction be granted as to any further prosecution on the second and third bonds, and on any verdict, judgment, or execution, on either of them ; and that the injunction, as to the ejectment suit, be dissolved ; and that no costs be taxed by either party as against the other.

Decree accordingly.

[* 131] *PECK *against* C. ELLIS, impleaded with ELLIS and ROWLAND.

Equity will not interpose to enforce a *contribution* between *wrong-doers* ; especially where they do not stand in equal right, or there is not equal equity between them.

April 11th.

THE petition of the defendant *Caleb Ellis* stated, that, on the 20th *January*, 1815, it was decreed, in this suit, that the petitioner, and *Isaac Rowland*, defendant, should convey to the plaintiff, in fee, their right to an undivided moiety of a lot of land, mentioned in the plaintiff's bill, and that it be referred to a master to ascertain the value of the *saw logs* and *timber*, cut or carried away from the lot by the defendants, or either of them, and that the defendants should pay such value, with the costs of suit. That, on the 12th *August*, 1815, the master reported that the value of the logs and timber taken and carried away by *Rowland*, was 890 dollars and 75 cents, and the value of the other timber carried away was 75 dollars and 25 cents, amounting in the whole to 966 dollars. That this report was confirmed, and an execution issued in favor of the plaintiff, against *C. Ellis*, and *Rowland*, for that sum, with the costs, exceeding 400 dollars. That the execution was levied on the property of the petitioner, which was advertised for sale by the sheriff of *Saratoga*, on the 20th of *April*, 1816 ; that *Rowland* resided in the same county, and had sufficient property. That on the 17th *March*, 1816, *Rowland*, as the

plaintiff admitted, had paid him the amount of the execution, and that the plaintiff paid the same to *James Thompson*, Esq., for a debt, and also assigned over the execution to him. That this assignment, as the petitioner was informed, was made for the benefit of *Rowland*, and the *sheriff had been directed to collect the whole amount of the petitioner, though he ought not to be liable for more than his proportion of the costs of the suit, provided *Rowland* was able to pay the residue. The petitioner prayed for an order directing the sheriff to collect the whole 966 dollars out of the property of *Rowland*, and just proportion of the costs only from the petitioner, &c.

1816.

PECK
v.
ELLIS.

[* 132]

The affidavit of *Rowland* stated, that, on the 31st of *October*, 1808, he purchased of *C. Ellis*, 200 pine trees, for sawing, which stood on the lot mentioned, which contained 200 acres; that *Ellis* affirmed that one half of the lot belonged to him; that the price of the trees was 100 dollars, part of which sum had been paid. That *C. Ellis* showed *Rowland* where the trees were to be cut, none of which were removed before the 1st of *December*, 1808; and on that day *Rowland* purchased of *C. Ellis* his moiety of the lot, for 200 dollars, and *C. Ellis* gave him a deed accordingly, with warranty, and also a covenant to indemnify *Rowland* against what *C. Ellis* alleged to be an unfounded claim of his brother-in-law to the lot. The contract, which was produced, recited the purchase, and that *Peck*, the plaintiff, had threatened that if any person cut timber on the lot, or occupied, he would file a bill in chancery for an injunction; and thereupon *C. Ellis* covenanted, that he would indemnify *Rowland* against the said bill or injunction, and of and from all costs and charges arising in consequence thereof, and would defend the suit in chancery, at his own proper costs and charges; and that if the title proved bad, the bond given for the purchase money should be void, and any money paid thereon be refunded. That *Rowland*, by the agreement, was to have the 200 trees clear, on paying the price of the land; that after the purchase, he, *Rowland*, continued to cut trees from the land as owner; that *Thompson* held the assignment of the decree and execution, as trustee, for the benefit of *Rowland*, and in order to collect the money of *C. *Ellis*; that any money paid by *R.* to *T.* had no relation to the decree or the assignment. That *C. Ellis* had said to the sheriff that he had no property to satisfy the execution; and *Rowland* said, that if he paid any part of the damages or costs, under the decree, he was assured the money would be lost.

[* 133]

The answers of *C. Ellis*, and *J. Rowland*, to the bill of the plaintiff, were also read at the hearing of the petition. The former said he was ignorant of the purchase of the lot

1816.

PECK
v.
ELLIS.

by the plaintiff, except from vague reports. That the deed to him was executed without any knowledge of any claim of the plaintiff. That when he, afterwards, sold to *Rowland*, he informed him, that he had heard that the plaintiff had made some pretensions to the lot, but that he, *C. E.*, believed he had abandoned them.

Woodworth, for the petitioner.

Henry, contra.

THE CHANCELLOR. Though the present application be by petition, it is in the nature of a bill filed by one defendant against another, for contribution, or to have the damages in the execution equally apportioned and levied.

By the decree in the original suit against these parties, as co-defendants, they were made jointly responsible for the damages assessed for cutting timber, and the decree on that point appears to have been taken as of course, without objection. There was no question raised as to the joint responsibility of the defendants. The petition is, therefore, to be considered as presented in a case in which the defendants were equally and justly chargeable, as it respected the plaintiff, with the damages for taking his property wrongfully and under fraudulent pretences, without title. It is always immaterial, in such cases, as it regards the rights of the plaintiff, which of the defendants appropriated *to himself the greater part, or the whole of the emoluments of the trespass. Each is answerable for the entire damage.

[* 134]

The application proceeds upon the admission of this principle, and of the correctness of the decree, and it is made for an apportionment of the damages, between the defendants, in respect to each other, and on the ground that the timber was, in fact, taken and enjoyed exclusively by *Rowland*."

But it appears to me, that as well on the special circumstances of this case, as on general principles, the motion ought not to be granted.

1. *Rowland* purchased 200 pine trees for saw logs, of *C. Ellis*, in October, 1808, for 100 dollars, and paid him part of the money; and when he purchased the land, in December following, the residue of the purchase money due for the trees was, by agreement, merged in the price of the land. There is, then, independently of any other consideration, a just claim by *Rowland* upon *Ellis*, for indemnity against the decree, to the amount of the trees so purchased and paid for. But *Rowland* produces a covenant of indemnity given at the time of his purchase, and for the express purpose of meeting this anticipated claim of *Peck*. The covenant recites

that *Peck* had threatened that if any person should cut timber, or occupy the lot, he would file a bill in chancery, and obtain an injunction; and it then provides that *Ellis* will indemnify *Rowland* "from the said bill of injunction, and of and from all costs and charges arising in consequence thereof, and will defend the said suit in chancery at his own proper costs and charges." I cannot perceive any equitable claim that *Ellis* can have to the interference of this Court in his favor, as to the costs of the suit in this Court. They are expressly within his covenant of indemnity; and the claim of *Rowland* to indemnity under this covenant, for the damages assessed by the decree, for using the timber, appears to me to be strongly supported. The covenant seems to have been intended against the suit at large. *It was against "the bill or injunction." It was from "all charges arising in consequence thereof." It was "to defend the suit in chancery at his own costs and charges." *Rowland* was a purchaser for a full consideration. He had heard of the claim of *Peck*, and he was assured by *Ellis* that it was utterly groundless; but, for greater caution, he took not only a deed with a general warranty, but an express covenant of indemnity against any suit in chancery founded on that claim. *Rowland* intended to be saved harmless in the use and enjoyment of the land, and of this very timber. The covenant expressly anticipated a charge for the cutting of timber, and in the spirit, if not under the legal construction, of that instrument, he ought to be protected by *Ellis* from the damages awarded by that decree. It is, at least, a case so favorable for *Rowland*, that I do not think this Court ought to interfere specially, and direct an apportionment of the damages between the two defendants to be made, in levying the execution.

2. These are grounds peculiar to this case, and they are very much strengthened by general considerations applicable to every case of this kind; for the defendants are charged with the value of the timber in the character of joint trespassers taking the mesne profits.

Caleb Ellis purchased the land of *James Ellis* fraudulently, and with intent to defeat the prior equitable title of *Peck*. When he sold the land to *Rowland*, he was conscious of the fraud, and yet he assured *Rowland*, that the claim of *Peck* was unfounded and abandoned. *Rowland* was no party to the original fraud, and might not have believed it. *Ellis* was guilty of fraud, both as it respected *Peck* and *Rowland*. If both defendants were chargeable with fraud, as they undoubtedly were, yet there was all possible difference in the demerit of each, and in the nature and degree of the fraud imputable to both. The fraud in *Rowland* was legal, or constructive fraud; but in *Ellis* it was actual fraud, in the first

1816.

PECK
v.
ELLIS.

[* 135]

1816.

PECK
v.
ELLIS.

instance, and, afterwards, in the *deception practised upon Rowland, by which he was led to purchase the land, and to use the timber as his own, when the right was in another. I doubt whether a Court of equity has ever aided one *tort-feasor* against another, in the apportionment of damages jointly assessed, even though they stood equal in wrong; but I am satisfied the Court has never interfered where the party seeking its aid is solely and deeply guilty, and was the cause of leading the other defendant to buy an unsound title. If any interference was proper, in this case, it would be to charge the damages exclusively upon *Ellis*; though where several persons are each strictly chargeable with damages, it might impair the just remedy of the injured party to limit the recovery to any one defendant.

Contribution is
allowed only
between de-
fendants stand-
ing in *aquali*
jure.

There is no con-
tribution be-
tween joint
trespassers at
law,

nor, it seems, in
equity.

[*137]

The principle of contribution is equality in bearing a common burden; but equality is not equity between two defendants who stand on such different ground. They must stand in *aquali jure*, or the rule does not apply. A Court of law will now sustain an action for contribution between two debtors or sureties, under an implied *assumpsit* arising from the knowledge and operation of the general principle that equality is equity. But a Court of law will not sustain an action between two joint trespassers. In *Merryweather v. Nixan*, (8 Term Rep. 186.) it was held, that if *A.* recover in tort against *B.* and *C.*, and levy the whole damages on one, that defendant cannot sue the other for contribution. I am not apprized of any decision in chancery to the contrary. In *Philips v. Biggs*, (*Hard.* 164.) a bill was filed by one of the sheriffs of *Middlesex* against the other, for contribution, in a case where the damages had been levied on one for an escape suffered by both, and the Court of Exchequer considered it a case of the first impression, and doubted, and no decision appears to have been made. But in the late case of *Lingard v. Bromley*, (1 Ves. & Beame, 117.) the master of the rolls observed, that where entire damages are recovered against several defendants for a tort, a Court of justice will not interfere to enforce contribution among the wrong-doers. In *Deering v. Earl of Winchelsea*, in the exchequer, (2 B. & Puller, 270.) Lord Ch. B. *Eyre* gave a very able opinion on this subject. He seemed to admit, that if one defendant was the author of the loss for which contribution was claimed, he was not entitled to any, because it was the maxim that a man must come into equity, in respect to such a demand, "with clean hands." He placed the whole doctrine of contribution on the ground that the parties were in equal right, and had equality of equity in respect to the burthen. But the present case is not within the reach of this doctrine; for the original purchase of the 200 trees, and the subsequent

covenant of indemnity against the suit, and the actual fraud of the one defendant, which was the cause of the decree, are facts which destroy the pretence of any equality of equity between the defendants, and show that the whole charge ought, in justice, to rest on the petitioner. There are many cases in which persons may be all liable to a third party, and yet ought not, in equity, to bear the burthen equally among themselves. (1 *Ves. & Beame*, 117.)

The civil law, like the decision in the *K. B.* which I have cited, would not allow any action for contribution between defendants condemned in damages for a joint offence, or cause of action arising *ex delicto*. The defendant on whom the whole was levied had no remedy over. The law would not recognize any of the rights or obligations of copartnership in an association for mischief. *Si ex dolo communi conventus præstiterit tutor, neque mandanda sunt actiones, neque utilis competit: quia proprii delicti pœnam subit: quæ res indignum eum fecit, ut à cæteris quid consequatur doli participibus: nec enim ulla societas maleficiorum, vel communicatio justa damni ex maleficio.* (*Dig.* 27. 3. 1. 14.) *Nec societas, aut mandatum flagitiosa rei, ullas vires habet.* (*Dig.* 18. 1. 35. 2.) But *Pothier* * (*Trait. des Obl. No. 282.*) considers these as rather scrupulous principles of the *Roman* lawyers, and says, that the *French* law is more indulgent, and gives an action to one co-trespasser who has paid the whole debt, and he puts it on the same principle as a contribution between co-sureties. I doubt much of the wisdom of this indulgence. Public policy speaks loudly against it. There would be no safety to property if a large combination of trespassers were entitled to the assistance of Courts of justice in the apportionment of the damage. The knowledge that each individual is responsible for the whole, constitutes the great check. (a) Where the contribution is asked for between parties jointly convicted of fraud, I should then, at least, prefer the doctrine of the civil law, and the sanction it has received from the stern, unaccommodating morality of Lord *Kenyon*. It appears to me more congenial with the spirit and genius of a Court of equity, not to lend an encouraging aid to parties, to apportion between them, by a nice and calculating hand, the penalty of their injustice. But it is evident that the rule even of the *French* law applies only to the case of two defendants charged with a common debt arising *ex delicto*, and standing *equal* in the transaction

1816.

PECK
v.
ELLIS.

[* 138]

(a) *Evans*, in his notes to a translation of the treatise of *Pothier*, gives a preference to the *French* law on this point, and considers the *Roman* jurists as over scrupulous; but he seems not to advert to the policy of the rule of the *Roman* and *English* law. (2 *Evans's Poth.* 80.)

1816.

 FERGUSON
 v.
 SMITH.

in relation to each other. On no other possible ground can the equity of contribution arise.

In every view, therefore, which I have taken of this case, I am of opinion that the motion ought to be denied.

Petition refused.

[* 139]

*FERGUSON *against* SMITH and others.

The service of a *subpœna* on the husband alone is good against both husband and wife, and he must answer for both ; but if the plaintiff seeks relief out of the separate estate of the wife, the service must be also on her, and she may put in her separate answer.

April 23d.

MOTION by *Garr*, for the defendant *Juliana Smith*, to set aside a decretal order for the sale of mortgaged premises, and under which a sale had been made, but no conveyance executed. The affidavit stated, that subsequent to the giving of the mortgage to *Marks*, the premises had been conveyed to her with the assent of her husband, and that the equity of redemption was in her ; that she had not been served with a *subpœna* to appear, and that her husband had now absconded and left her, and that she was willing to redeem the premises by paying off the mortgage debt, and bringing the money into Court.

J. Strong, contra, showed by affidavit, that the process was served on the husband, and that it was understood, and so charged in the bill, that the deed from *Marks* was taken in the wife's name, to secure the property from her husband's creditors, and that the purchase money was paid out of his property.

THE CHANCELLOR. The general rule is, that the service of a *subpœna* against husband and wife on the husband alone, is a good service on both, and the reason is, that the husband and wife are one person in law, and the husband is bound to answer for both. (*Wyatt's Pr. Reg.* 402, 403. *Gilbert's For. Rom.* 41, 42. 1 *Harris. Ch. Practice*, 207.) But where the plaintiff is seeking relief out of the separate estate of the wife, it has been deemed necessary, in a late case, (9 *Vesey*, 110

488.) that the wife should be served. Here *the right of redemption is exclusively in the wife, and her husband has absconded; she asks only for an opportunity to redeem, and I think it ought to be granted. If she had alleged any defence, I should have been also inclined to have granted her leave to put in a separate answer, but she admits the demand, and only asks for leave to redeem the mortgage.

The motion is granted, on her bringing into Court, in four weeks, the debt and interest, together with the costs accrued prior to the decretal order of sale.

Motion granted.

1816.

HAM
v.
SCHUYLER.

HAM *against* SCHUYLER and others.

In ejectment causes, where the title at law is admitted, or no discovery is sought for, to aid a defence at law, an injunction will be granted upon terms only, so as to leave the party to proceed to trial and judgment at law.

THE bill was for specific performance of a parol contract to execute a lease for three lives. No discovery was prayed for. An action of ejectment was pending at law; and the bill prayed for an injunction, which was granted in 1814. An answer was not yet put in by the defendants.

May 6A

Henry, for the defendants, moved for a modification of the injunction, so far as to permit the plaintiffs to proceed to trial and judgment at law, and no further. He cited *Wyatt's Pr. Reg.* 250. 252. *Hinde's Practice*, 597.

Woodworth, contra.

THE CHANCELLOR. The bill proceeds on the ground, that the plaintiffs have no defence at law, and no discovery *is sought to aid any such defence. The claim is purely equitable, and there is no good reason why the defendants should not be at liberty to proceed to trial and judgment at law. This appears to be the practice; and the Court, generally, imposes further terms to prevent trouble and delay, before an injunction is granted in ejectment cases, where no discovery is sought, and the title at law is admitted. (*Hinde's Ch. Practice*, 585. 591.)

[* 141]

Motion granted.

1816.

32

Codd
v.
Codd.

Codd against Codd.

Whether this Court will grant a writ of *supplicavit*, to protect a married woman from violence threatened to her by her husband, by compelling him to give sureties to keep the peace? *Quære.*

Such a writ will not be granted where the *menaces*, &c., sworn to, were 8 years before the application for the writ, during which interval the husband was absent from the state, and had lately returned; but the Court, under the circumstances of the case, ordered that the wife should have the exclusive custody, care and direction of the children, and that the husband should not be permitted to visit them except under the direction of one of the masters of the Court.

May 31st.

[* 142]

THE bill, which was for a divorce, stated the marriage of the parties in *Ireland*, in 1799; their removal to this state in the same year; that they have five children; that the plaintiff is entitled to a large real estate, and the defendant has no property of his own. That he is intemperate, and of a violent temper, and treated the plaintiff and her children cruelly; that he has attempted, by threats and coercion, to make her dispose of her property for his use. That in 1808, they agreed to a separation, and conveyed the property to trustees; and which was since vested in *T. A. Emmet*, by a decree of this Court; that in 1813, the defendant *gave a power of attorney to *T. A. E.* to use his name, &c. That the defendant left the plaintiff in 1809, and went to the south, and has not since seen or assisted his wife. That the defendant has now returned, and revoked the power of attorney, and committed adultery, &c. The bill prayed that the plaintiff might be protected in her person and property, and that the defendant might be restrained from intermeddling with the care and education of the children, and that the marriage might be dissolved.

The *petition* accompanying the bill stated, that the plaintiff was apprehensive of personal insult and violence, and injury to her person and papers, and prayed for a writ of *supplicavit*, to protect her person and property, and children from insult and injury pending the suit, and that the defendant be restrained from intermeddling with her real estate, and that the exclusive care of the children be confided to her. This petition was attended with her affidavit annexed, giving a history of their marriage life, and of successive acts of the defendant of menace, violence, and cruelty, towards her and her children, from 1800 to 1808, when he left the state. That he returned in *March* last, and that the plaintiff and her children have been obliged to live in a state of

seclusion and secrecy, from a dread of his violence. A certificate of Dr. *M. Nevin*, and of *John G. Bogert*, was annexed, in favor of the fitness of the plaintiff to have charge of her children.

1816.

Codd
v.
Codd.

J. V. N. Yates, for the plaintiff.

THE CHANCELLOR. There is no act of violence or dangerous threat charged since the return of the defendant into this state, in *March* last, and those which are charged are of the date of 1808. There does not appear, then, to be sufficient ground for the extraordinary interference of this Court, pending the suit, to hold the defendant to bail, *to keep the peace, under a writ of *supplicavit*, after the lapse of so many years since the injuries complained of. In *Clavering's* case, (2 *P. Wms.* 202.) and in *King v. King*, (2 *Ves.* 578.) the interposition of the Court in this way was where life was sworn to be in danger. But I do not mean to say that the affidavit need to go that length, but the danger to personal safety must appear to be serious and imminent. In *Heyn's* case, (2 *Ves. & Beame*, 182.) the wife swore to the apprehension of great bodily injury; and in the case *ex parte King*, (*Amb.* 333.) to an assault and battery, and apprehension of further ill usage. Still, if a case proper for such a writ, under the above cases, was made out, I should hesitate about granting it. Why should not the party apply to a justice of the peace to bind the other to his good behavior? It was said, in *Clavering's* case, that the master of the rolls generally refused the writ, and directed the party aggrieved to justices of the peace. The application in *Heyn's* case, which is the only very modern case I have met with, was, by the exhibition of articles of peace, under the stat. of 21 *Jac.* I. c. 8., which recognizes such a process of the peace from chancery, and regulates it; but that statute has not been re-enacted here.

[* 143]

The other part of the prayer of the plaintiff can be granted without much difficulty, for it is very apparent that the care and custody of the children should, for the present, be vested in the plaintiff; and the act (sess. 38. ch. 221.) gives the Court special power in such cases.

The following order was thereupon entered: "*Ordered*, that the custody, care and education of the children of the petitioner be, until further order, confided to the said petitioner exclusively, and that the defendant shall not, until further order, be permitted to visit the said children, except under the direction of one of the masters of this Court."

1816.

WIGGINS
v.
ARMSTRONG.

*WIGGINS and BOERUM *against* ARMSTRONG, DOTY and MARSHALL.

A creditor at large, or before judgment, is not entitled to the interference of this Court, by *injunction*, to prevent the debtor from disposing of his property in fraud of such creditor.

June 12th.

THE bill stated, that the defendant *Doty*, on the 24th of *October*, 1815, purchased of the plaintiffs goods to the value of 1,262 dollars and 55 cents, on a credit of six months, which sum was now due. That the defendant *Doty*, in 1815, gave the plaintiffs his note for 1,255 dollars, for other goods sold, and which note was due, and a balance thereon unpaid of 609 dollars and 18 cents. That *W. and S. Green* lately became endorsers of sundry notes for the defendants to 4,000 dollars, who, to secure them, in *February* last, executed to them a judgment bond for 4,000 dollars, on which a judgment was, at the time, entered. That the defendant *A.* then became endorser for *D.*, on the notes aforesaid, and exonerated *W. and S. Green*, who assigned the judgment to the defendant *A.* That *D.*, in *October* last, recommended the defendant *M.* to the plaintiffs for the purchase of goods, and *M.* purchased goods of the plaintiffs to 1,627 dollars and 9 cents, on a credit of 6 months. That the notes endorsed by the defendant *A.* have been reduced to 1,800 dollars. That *M. and D.* are embarrassed, and to defraud the plaintiffs, *D.*, in collusion with *A.* gave a judgment to *A.* for 15,000 dollars, in *March* last, and *M. and D.*, in collusion with *A.*, have jointly given a judgment to *A.* for 18,000 dollars, in *March* last. That the plaintiffs have commenced suits against *D. and M.*, but have not yet obtained judgment. That the two last judgments were voluntary, and without consideration, *and with intent to defraud the plaintiffs. The plaintiffs prayed for relief, and for an injunction against proceeding on the judgments by execution, &c. ; and an injunction was granted.

[* 145]

No answer had been put in by the defendants.

June 10th.

Emott, for the plaintiffs, now moved to dissolve the injunction, on the ground that the plaintiffs are not judgment creditors, and have not obtained any lien on the property of the defendants, and, therefore, have no right to question the judgments. He cited *Mitford*, 114, 115. *Cooper's Eq. Pl.* 149. 1 *P. Wms.* 445.

Brackett, contra, contended, that the Court has jurisdiction to stay execution, though the plaintiffs have not proceeded to judgment; and cited 6 *Vesey*, 689.

1816.

WIGGINS
v.
ARMSTRONG.

THE CHANCELLOR. This is the case of a creditor on simple contract, after an action commenced at law, and before judgment, seeking to control the disposition of the property of his debtor, under judgments, and executions, upon the ground of fraud. My first impression was in favor of the plaintiffs; but upon examination of the cases, I am satisfied that a creditor at large, and before judgment and execution, cannot be entitled to the interference which has been granted in this case. In *Angell v. Draper*, (1 *Vern.* 399.) and *Shirley v. Watts*, (3 *Atk.* 200.) it was held, that the creditor must have completed his title at law, by judgment and execution, before he can question the disposition of the debtor's property; and in *Bennet v. Musgrave*, (2 *Ves.* 51.) and in a case before Lord *Nottingham*, cited in *Balch v. Wastall*, (1 *P. Wms.* 445.) the same doctrine was declared, and so it is understood by the elementary writers. (*Mitford*, 115. *Cooper, Equ. Pl.* 149.) The reason of the rule seems to be, that until the creditor has *established his title, he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds. On the strength of settled authorities, I shall, accordingly, grant the motion for dissolving the injunction.

[* 146]

Motion granted.

1816.

—
FORT
v.
RAGUSIN.

FORT *against* RAGUSIN and BARKER.

This Court will order a witness to be examined *de bene esse* in a cause, though no answer has been put in, if the necessity for taking his deposition is satisfactorily shown by affidavit.

June 13th.

ANTHON, for the plaintiff, moved for an order to examine *Francisco Toone, de bene esse*, as a witness on the part of the plaintiff, on an affidavit of the witness, stating that he is not a resident of *New-York*, and is a mariner, and has concerns which require his immediate attendance at the *Havannah*; that he has been prevented from returning to the *Havannah*, from whence he lately came, at the request of the solicitor and agent for the plaintiff, in order to give testimony in this cause, and that he is about to return to the *Havannah*; that the plaintiff is absent from this state, and he has been informed by the counsel for the plaintiff, and believes, that his testimony will be material for the plaintiff.

The defendants had not yet put in their answer.

[* 147] **T. A. Emmet**, contra, objected, on the ground that this *was not done in this Court, until after issue joined, or upon a bill to perpetuate testimony.

THE CHANCELLOR. It would seem that the present application is warranted by the practice of this Court; and we know that a similar practice has long prevailed in the Courts of law. The same reasons which support the practice in the Courts of law, would support it here.

In the case of *Bagnold v. Green*, which was as early as the reign of *Elizabeth*, (1 *Dickens*, 2. *Carey*, 48.) upon a suggestion merely, without affidavit, that if certain persons should die, their death would be very prejudicial to the plaintiff, a commission was issued to examine witnesses for the plaintiff, though the defendant had not put in his answer. In the late case of *Shelly*, (13 *Vesey*, 56.) after bill filed, and appearance, but no answer, on suggestion that the defendant, who was an infant, was kept out of the way, so that the plaintiff was not in a situation to bring his cause to a hearing, and on motion to examine witnesses *de bene esse*, the chancellor said, he should have no doubt in granting the application, though it did not come within any of the three cases, of witnesses of the age of 70 years, witnesses quitting the kingdom, or of a fact depending on a single witness.

In addition to these cases, we have it laid down, in a late

treatise on the principles and practice of the Court, (2 *Maddock*, 202.) that after suit commenced, but before, in the regular course of proceedings, the witnesses can be examined, if their testimony is likely to be lost, the Court will grant a commission to examine such witnesses *de bene esse*.

Every motion of this kind must be supported by affidavit, disclosing sufficient reasons arising out of the necessity of the case. This has been done in the present instance; and I am, accordingly, of opinion, that the motion ought to be granted.

Motion granted.

1816.

BRADY
V.
WALDRON.

*BRADY *against* WALDRON and WALDRON.

[* 148]

An injunction lies against a mortgagor, in possession of the mortgaged premises, to stay waste.

THE bill was filed by the plaintiff, a mortgagee, for an injunction to stay waste in cutting timber on the mortgaged premises, whereby the land would become an insufficient security for the debt. There was no suit pending for a foreclosure.

June 15th.

THE CHANCELLOR. An injunction lies against a mortgagor in possession to stay waste. The Court will not suffer him to prejudice the security. (*Dick. Rep.* 75. 3 *Atk.* 210. 237. 3 *Vesey*, 105.)

Injunction granted.

1816.

DEPEYSTER
v.
GRAVES.

DEPEYSTER *against* GRAVES and others.

If all the defendants are implicated in the same charge, the answer of all will, in general, be required, before an injunction will be dissolved; but if the defendant on whom the *gravamen* of the charge rests has fully answered, that may be sufficient; but where the answer of all the defendants can and ought to come in, yet if the plaintiff does not take the requisite steps, with all reasonable diligence, to expedite his cause, the injunction may be dissolved.

As where an injunction had been granted to stay a suit at law, and some of the defendants have answered, but the plaintiff has neglected, for nine months, to take any steps to compel the other defendants to appear and answer, or to have the bill taken *pro confesso* against them, the injunction was, on motion, dissolved.

June 15th.

[* 149]

THE bill was filed the 27th of February, 1815, against Graves and four other defendants, for an account and set-off. *Graves, Armitage, and Sharp, three of the defendants, put in their answers on the 21st of September last, since which there had been no proceedings on the part of the plaintiff. Worrall & Williamson, the other two defendants, have been, and still are, residents in England, and the plaintiff had taken no steps to compel them to appear, and answer, or to have the bill taken *pro confesso* against them.

A motion was now made, on the bill, and the answer of the three defendants, to dissolve the injunction, and that the bill be dismissed.

T. A. Emmet, for the defendants. He cited 1 Har. Ch. Practice, by Newland, 315, 316. 548. Wyatt's Prac. Reg. 178. 2 Fowler's Excheq. Practice, 27. 1 Fowler's Excheq. Practice, 322. 9 Vesey, Rep. 512.

Peter A. Jay, contra. He cited Dickens, Rep. 691. 2 Anst. Rep. 366.

THE CHANCELLOR. The general rule is, that an injunction properly granted is not to be dissolved until the answer of all the defendants has come in. (Wyatt's P. R. 234. But this rule has exceptions, and is subject to discretion and modification. If both the defendants were implicated in the same charge, I should require the answer of both, without some special reason to the contrary. If, however, the defendant on whom the real *gravamen* rested had fully answered the bill, this would probably be sufficient, and in many cases the injunction will be dissolved, as against the defendants who had answered. This was done in Joseph v. Doubleday; 118

(1 *Ves. & Beame*, 497.) and in other cases, where the answer of all can and ought to come in, the injunction will be dissolved, if the plaintiff does not take the requisite steps, with all reasonable diligence, to expedite his cause. Here has been a delay of nine months, *since the answer of the three defendants who reside here, and who are suing at law as trustees for the creditors of the two defendants residing abroad, and they have denied all equity in the bill, as far as it rested in their knowledge or belief. The bill is not specially for a discovery, but for an account, and for the allowance of a set-off, which, if allowable at all, would seem to be equally so in the action at law. No steps have been taken in respect to the absent defendants, and no excuse offered for the neglect. There is a want of due diligence in the plaintiffs, since the obtaining of the injunction, and that is always a cause for dissolving it. (17 *Vesey*, 281.)

1816.

DEPEYSTER
V.
GRAVES.

[* 150]

Injunction dissolved.

119

1816.

LANSING
v.
STARR.

LANSING *against* STARR.

The statute of limitations is a good plea in bar, in this Court, as well as at law ; and where to a suit at law the defendant had pleaded the statute, and the plaintiff filed a bill of discovery, with a view to enable him to show a promise within six years, it was held that the defendant was not bound to discover any thing that would destroy the effect of his plea at law.

July 2d.

THE plaintiff had brought an action at law against the defendant, as endorser of a promissory note, and the defendant pleaded the statute of limitations. This bill was filed for a discovery, as to the origin and consideration of the note, and as to payments made by the drawer, and acknowledgments by the defendant, within six years.

The defendant put in his plea and answer ; and as to so much of the bill as sought a discovery respecting the making and endorsement of the note, or its consideration, or any promise of the defendant to pay it, or any confession of *the defendant that he owed the note, or any payments thereon, he pleaded that the cause of action, if any, did not accrue within six years before filing the declaration in the suit at law ; and the plea averred, that the defendant had not, within six years previous to the suit, promised to pay the note, or confessed there was a balance due on it, and that the payment endorsed on the note was not made by the defendant, or by the maker on his account.

[* 151]

The answer denied the payment, or any confession of payment, or any promise to pay the note, at any time, or any confession of any liability to pay it.

The cause was set down for hearing on the bill and plea.

Buel, for the plaintiff.

Henry, contra.

THE CHANCELLOR. The defendant is sued at law as endorser of a note, and has pleaded the statute of limitations. The object of the suit here is, to obtain from the defendant some disclosures of the origin and ground of the consideration of the note, so as to enable the plaintiff to meet the plea at law, by showing a payment by the drawer, made and endorsed within the six years. I shall not undertake to inquire whether the discovery, if obtained, could be available at law, in opposition to the plea ; but I am of opinion that the defendant is not bound, in this case, to make any dis-

covery that will destroy the effect of his plea at law. The statute of limitations is a good plea in bar, in this Court, as well as at law, to an action on the note. All the cases show this, and the statute may be pleaded in bar of a discovery of the actual subsisting existence of the debt or of its acknowledgment, for otherwise, the authority of the statute might, at any time, be defeated by a bill of discovery.

*There must be something special in the case, or some new equity, to form an exception to this general rule. The plea denies any privity between the parties, or any authority from the defendant, in respect to the payment endorsed on the note. The original consideration of the note has, then, nothing to do with the force and effect of the plea; and I see no good reason why the defendant should be obliged to make those discoveries, in order to enable the plaintiff to try the *experiment* how far they may enable him to defeat the plea at law.

I am, accordingly, of opinion, that the plea is sufficient, and the objections to it are overruled.

VOL. II.

16

121

1816.

LANSING
V.
STARR.

[* 152]

1816.


 DYER
 v.
 POTTER.

HEIRS OF DYER *against* THE HEIRS, EXECUTORS AND TRUSTEES OF POTTER.

On a bill by the heirs of *D.*, against the heirs, &c. of *P.*, for a specific performance of an agreement, it appearing that there was no improper behavior or unjustifiable defence, the defendants were not decreed to pay costs.

July 20th.

THE bill, in this case, was for a specific performance of a contract to convey land. *Dyer* had, in his lifetime, taken possession, made improvements, and paid the full consideration which he was to give for the land, according to the articles of agreement. The evidence of the payment consisted principally in the record of a judgment at law, in a suit brought by the executors of *Potter* against *Dyer*, in his lifetime, for the consideration, and in which suit, on a reference, it was shown that the consideration had been paid, and a considerable sum was reported due to *Dyer*, and judgment was entered accordingly.

[* 153]

**Gold*, for the plaintiffs.

J. C. Spencer, contra.

THE CHANCELLOR. The proof of payment is sufficient, and a conveyance must be decreed to the heirs of *Dyer*. As to the question, whether the heirs and trustees of *Potter* shall pay costs, it appears that they were not privy to the suit and trial at law, and there was no such improper behavior or unjustifiable defence as to charge them with costs consistently with the course of the Court. (*Shales v. Barrington*, 1 *P. Wms.* 481. *Webb v. Claverden*, 2 *Atk.* 424. *Berney v. Eyre*, 3 *Atk.* 387.) Neither party, therefore, is to have costs as against the other.

1816.

GENERAL
RULE

GENERAL RULE.

His Honor the chancellor this day made the following order:—

Ordered, That whenever a defendant shall cause his appearance to be entered, but shall not cause his answer to be filed in due time, an application may thereupon be made to the chancellor (without previous notice) by petition, stating the circumstances, for an order, that the defendant answer the plaintiff's bill in such time, after service of a copy of the order for that purpose, as the chancellor shall direct, or, in default thereof, that the bill be taken *pro confesso*. And if the defendant shall not answer within the time limited by such order, a rule for taking the bill *pro confesso* may be entered, as of course, on filing an affidavit of the service of a copy of the said rule. *Practice*

1816.

HEYER
v.
DEAVES.

*HEYER *against* DEAVES.

All sales of mortgaged premises, under a decree of the Court, must be made by a master, or under his immediate direction. A sale by a person deputed for the purpose by a master, in his absence, is irregular, and will be set aside.

August 12th. **WOODWARD**, for the defendant, moved to set aside a sale of the mortgaged premises made under a decree of this Court, as being unduly conducted, and made in the absence of a master.

H. Bleecker, contra.

THE CHANCELLOR. The master, being sick, did not attend the sale, but deputed a competent agent, who attended and sold the land. The objections to the fairness and regularity of the sale are denied and completely removed, except the objection that the sale was not made by a master who was present. The statute says, (*Laws*, sess. 36. ch. 95. sec. 11.) "that all sales of mortgaged premises, under a decree, shall be made by a master;" and I do not think it proper to allow such a trust as this to be the subject of a special deputation. It appears, by one of the affidavits, that the master in whose name the mortgaged premises were sold, was, at the time, in the city of *New-York*, about 90 miles from the place of sale. If he had been present, and had employed an auctioneer or cryer, it would still have been his sale, and the parties would have had all the benefit of his superintendence and judgment. But to allow such a sale as this to stand, would open the door to a very lax and dangerous practice. The statute intended that such sales should be under the immediate direction of a known and responsible public officer. An under or deputy-master is not an officer known in law.

[* 155]

*I shall, therefore, direct, that the sale, and all proceedings thereon, be annulled, and that the mortgaged premises be again sold under the former decree of this Court, for that purpose, and according to the directions thereof, and that the question of costs on this motion be reserved.

1816.

MURRAY
v.
FINSTER.

MURRAY and WINTER *against* FINSTER.

Where the defendant purchased part of a trust estate, with notice of the pendency of a suit against the trustee for a breach of trust, and of an injunction, he was decreed to pay the consideration money, with interest, to the plaintiff, for the use of the *cestui que trusts*, or to convey in fee the land purchased to and for the same trusts.

The defendant must deny all notice, even though it is not charged, otherwise he will not be deemed a *bona fide* purchaser.

Where land was held in trust for G. for life, with power to her to dispose of the same among her children, a son of G. was held a competent witness for the plaintiff, in a suit to recover part of the trust estate sold in violation of the trust.

THE plaintiff *Winter* was a trustee of certain lands in *Cosby's* manor, and other tracts, to and for *Patrick Heatley*, the owner, who has since released the estates to *Temperance Green*. A bill was filed, in 1809, against *Winter* for a breach of trust, and an injunction issued to prevent his selling or disposing of the trust property, or the proceeds thereof; and, by a subsequent order of the Court, he was superseded in the further execution of the trust, and the plaintiff *Murray* was appointed, in his stead, a receiver on the said estates, and authorized to use the name of *Winter* in any suits concerning the same.

August 13th.

In *February*, 1810, after *Winter* had been served with the injunction, and while the suit was in full prosecution; and though, by the deed of trust, *Winter* was not authorized to sell any part of the said estates, without the previous consent of *Nathaniel Pendleton*, *Robert Murray*, and *Comfort *Sands*, yet, as the bill stated, he did, in 1812, contract to sell to the defendant 39 acres of land, in lot No. 45, in *Cosby's* manor, at 18 dollars per acre. Previous to the contract, and before payment of the purchase money, the defendant was informed, by the agent of the owner, of the pendency of the suit against *Winter*, for a breach of trust, and of the injunction. Afterwards, in 1813, *Murray*, the plaintiff, informed the defendant of his being appointed, in the place of *Winter*, to manage the trust estate, and showed the order for the purpose. The plaintiffs alleged, that the sale by *Winter* to the defendant was for these causes, collusive and void, or, if the same was to be carried into effect, they were entitled to receive the purchase money from the defendant.

[* 156]

The defendant put in a plea and answer. The plea stated, that on the 17th *May*, 1809, the defendant contracted with *Winter* to purchase the land; and that on the 29th *July*, 1809, *Winter* being, or pretending to be, seised in fee

1816.

MURRAY
v.
FINSTER.

of the premises, conveyed the same to the defendant, by deed, with a covenant of warranty, for the consideration of 703 dollars; and the defendant averred, that he paid the whole consideration money to *Winter*.

The defendant, in his *answer*, admitted the orders of the Court, and that he had several conversations with the plaintiff *Murray*, and *Henry Green*, the agent on the estates, relative to the premises; but which conversations he could not particularly recollect, except that in 1813, *Murray* informed him of his being appointed to manage the estates instead of *Winter*, and cautioned him from paying any more money to *Winter*, when the defendant told him he had already paid the money to *Winter*.

The defendant also admitted that an injunction was issued as stated in the bill, but he was advised, that as the same was issued by a master's order, dated 11th *October*, 1813, and was not confirmed according to the rules of Court, the same was dissolved, of course.

[* 157]

**Henry Green*, the agent of the owner, who was examined as a witness for the plaintiff, stated, that in the spring or summer of the year 1810, the defendant told him that he had a conversation with *Winter* about buying the land, but hearing there was a dispute, he had dropped the negotiation. The witness warned him not to pay any money to *Winter*, and the defendant said he had not paid him, but had lent money. The witness gave the defendant notice of the suit then pending in this Court. Another witness testified, that he heard the defendant say, that he bought the premises in 1809, and paid for them in 1812; having given a bond and mortgage to secure the purchase money.

An exception was taken, on the part of the defendant, to the competency of *Henry Green* as a witness; the estates being held in trust for his mother, with a power to her to dispose of the same among her children.

Gold, for the plaintiffs.

N. Williams, for the defendant.

THE CHANCELLOR. Neither the plea nor answer deny notice of the pendency of the suit, and of the claim of *Mrs. Green*, prior to the payment to *Winter* of the purchase money. The denial of notice was essential to the validity of the defence. (1 *Johns. Ch. Rep.* 302. 575.) But here is positive proof of notice prior to the payment of the money. The money was paid in 1812, and the defendant was duly warned long before. I have considered *Henry Green* as a competent witness. He has no direct or certain interest in the

suit. The estate is in his mother, and under her control, and subject to her disposition, in respect to her children. The fact of notice prior to the payment of the purchase money being clearly established, the defendant paid the money to *Winter* in his own wrong. It was in fraud of the rights of *the *cestui que trusts*, and destroys the goodness of his defence. (1 *Johns. Ch. Rep.* 301. and the cases there cited.)

I shall, accordingly, decree, that the defendant, within 40 days from the service of a copy of this decree, pay to the solicitor, for the plaintiffs, or bring into Court, the sum of 703 dollars, with interest from the 29th of *July*, 1809, unless he shall, within that time, elect to convey in fee the premises in the pleadings mentioned, to *Mary Green* and *Henry Green*, to be held by them in trust; and that in either case he pay the costs of this suit. (a)

(a) See *Green v. Winter*, vol. 1. p. 26—44. 60.

1816.

HEATLEY
v
FINSTER.

[* 158]

May 6th.

HEATLEY and others *against* FINSTER and MULLER.

A purchaser is chargeable with notice of a suit pending in this Court; and after such notice all further proceedings towards completing the purchase, or paying the money, are fraudulent and void. A denial of notice of the pendency of the suit is not sufficient, if the defendant at the time knew the character of the person of whom he purchased, that he was a trustee, and had no power to sell.

WINTER, one of the plaintiffs, was a trustee of certain estates of *Heatley*, the plaintiff, with power to sell parts of the same under certain restrictions. *Heatley*, having no children, granted the trust estates to *T. Green*, his sister, for life, with power to dispose of the same among her children. On the 17th of *May*, 1809, *Winter* sold 50 acres, part of the trust estate, to *Muller*, the defendant, for 750 dollars, payable in seven annual instalments, with interest; the first instalment to be paid on the first of *April*, 1811. *Muller* occupied the land so purchased of *Winter* until 1814, having paid 80 dollars of the purchase money, when he assigned *the contract for the purchase to *Finster*, the defendant, who entered on the land, and has improved it to this time. A bill having been filed against *Winter* for a breach of trust, an injunction was issued, to restrain him in the further exe-

August 13th.

See *Murray v.*
Finster, the
last case.

[* 159]

1816.

HEATLEY
v.
FINSTER.

cution of his trust, and *Murray* was appointed to manage the trust estates in his stead. *Murray* obtained an order of this Court that *Winter* should convey the premises in question to *Muller*, or to *Finster*, his assignee, on payment of what was due on the contract, or on his giving a bond and mortgage for the residue of the purchase money, which order was served on *Finster*, who refused to concur in carrying the order into effect, and *Winter* also refused to deliver the contract to *Murray*, alleging that it was mislaid. The bill stated that *Winter* and *Finster*, by concert, obtained an order of the Court, to carry into effect the contract between them, with a view to defraud the owners of the estate, &c.

The defendant *Finster* put in a plea and answer. The plea stated that *Muller*, in 1812, assigned the contract to *Finster*, who agreed to pay the purchase money, but that he, *Finster*, had lost the contract, or delivered it up to *Winter*; that *Winter* having approved of the assignment, the defendant *Finster*, in September, 1813, filed a bill against *Winter* for a specific performance of the contract; and in the same month, a decree was entered, by consent, for carrying into effect the contract, on payment of the purchase money due to *Winter*, and giving him a mortgage for the residue. That in pursuance of that decree, *Winter*, on the 14th of January, 1814, in consideration of 1,015 dollars, due on the contract, conveyed the premises to the defendant *F.*, who, at the same time, gave to *Winter* his promissory notes for about 300 dollars, and which, except one for 118 dollars, were negotiated, and had been paid by the defendant to the holders; and that he paid the residue of the purchase money to *Winter*. The defendant *F.* averred, that at the time of purchasing the contract, and receiving the conveyance *from *Winter*, and making the payment of the purchase money, and giving the security pursuant to the said order or decree, he, *F.*, had no knowledge of any suit in chancery against *Winter*, or of any order or injunction of the Court, as mentioned in the bill of the plaintiffs; and the defendant, therefore, pleaded the conveyance, &c. in bar of the relief prayed by the plaintiffs.

[* 160]

In his answer, the defendant *F.* denied any personal knowledge of the order or injunction against *Winter*, but he believed they existed as stated in the bill. He admitted the service on him by *Henry Green*, in August, 1814, of the order to carry into effect the purchase with *Murray*, which he refused on the ground that he had, before, without any knowledge of any order of injunction, received a conveyance of the premises from *Winter*, and had paid part of the consideration money, and given his notes for the residue. That, being an ignorant man, occupied in agriculture, he

acted, in a great degree, under the influence of *Winter*, who represented himself to be, and was generally considered to be, the owner of the land in fee.

The bill was taken *pro confesso* against *Muller*

1816.

HEATLEY
V.
FINSTER.

Gold, for the plaintiffs. He relied on the case of *Murray v. Ballou*, (1 *Johns. Ch. Rep.* 566.) and the cases there cited.

N. Williams, for the defendant *Finster*.

THE CHANCELLOR. When *Finster* took an assignment of *Muller's* contract, the consideration had not been paid to *Winter*. The plea admits that 1,015 dollars were due and paid by the defendant to *Winter*, in 1814, when a deed was executed. The question is, whether the whole negotiation between the defendant and *Winter*, and the payment of the money, was not, in judgment of law, a fraud upon the rights of the plaintiffs. I consider the defendant as chargeable, at that time, with notice of the suit then *pending against *Winter*, for a breach of trust. In explanation of the rule on this point, I can add nothing to what was said in the case of *Murray v. Ballou*, (1 *Johns. Ch. Rep.* 566.) The defendant denies notice of the suit, but there is no denial of notice of the character in which *Winter* dealt; and, indeed, after the proof that we have had in the case of *Murray v. Finster*,† of positive and direct notice given to the defendant, as early as 1812, (and which notice is not even denied in that case,) the denial of actual notice here of the existence of any suit against *Winter*, when he made the payment in 1814, cannot but excite surprise and concern. The amicable suit instituted between the defendant and *Winter* in September, 1813, and terminated as soon as it was commenced, by a decree, by consent, adds nothing to the validity of the defendant's claim. It was nothing more nor less than a private agreement put into the shape of a decree for a more imposing appearance. *Muller's* original contract, though good in the first instance, was left inchoate, without delivery of the deed, or payment of the money; and when the party became chargeable with notice of the suit against *Winter*, he was bound to cease all further dealing with him, on the subject matter of the trust. (See cases cited in 1 *Johns. Ch. Rep.* 301.) To allow the payment to stand good would be permitting trust property to be fraudulently dissipated in contempt of the authority, and in evasion of the process of this Court.

[* 161]

† *Ante*, p. 155.

I shall, therefore, decree, that the defendant *Finster*, within 40 days from the service of a copy of this decree,

1816.
 ~~~~~  
 GARDNER  
 v.  
 VILLAGE OF  
 NEWBURGH.

pay to the solicitor of the plaintiffs, or bring into Court, the sum of 1,015 dollars, with interest from the 14th of *January*, 1814, unless he shall, within that time, elect to convey in fee, and actually convey by deed, with proper covenants against his own acts, to be approved by a master, the premises in the pleadings mentioned, to *Mary Green* and *Henry Green*, to be held by them in trust, &c. and that in either case, he pay the costs of this suit.

[ \* 162 ]     \*GARDNER *against* THE TRUSTEES OF THE VILLAGE OF  
 NEWBURGH, and HASBROUCK and BELKNAP.

The owner of land through which a stream of water runs has a legal right to the use of the water, of which he cannot be deprived without his consent, or a just compensation.

This Court has a concurrent jurisdiction with Courts of law, in a case of private nuisance by diverting or obstructing an ancient water course, and may issue an injunction to prevent the interruption, though the plaintiff has not established his title at law.

Though the legislature has power to take private property for useful and necessary public purposes, it is bound to provide a fair compensation to the individual whose property is taken, and until a just indemnity is afforded to the party, the power cannot be legally exercised.

Where an act of the legislature authorized the trustees of a village to supply it with water, by means of conduits, and, for that purpose, to enter on the lands of other persons, to make reservoirs, and lay conduits, &c., and provide compensation for the owners of such land, and also for the owner of the land on which the spring or source from which the water was to be conducted was situated, but made no provision for indemnifying the owners of lands through which the stream flowed, and, from such spring, had run, from time immemorial, for the injury they must suffer by diverting the course of the stream from their farms; the Court granted an injunction to prevent any proceeding to divert the stream until provision was made for a just compensation to the persons who might be injured by diverting the water.

*August 22d.*

THE bill, which was for an injunction, stated, that the plaintiff is owner of a farm in the village of *Newburgh*, through which a stream of water has, from time immemorial, run, having its source from a spring in the adjoining farm of the defendant *Hasbrouck*, and after entering the plaintiff's land, continues its whole course through his farm, until it empties into the *Hudson* river. That this stream greatly fertilizes his fields, and, running near his house, serves for watering his cattle, and for various domestic and economical purposes. That it supplies water to a brick yard on the farm

of the plaintiff, where most of the bricks used in *Newburgh* are made; it also supplies a large distillery erected by him at great expense, and a \*churning mill, and water for a mill-seat, where the plaintiff is about to erect a mill for grinding plaster of paris. That the trustees of the village of *Newburgh*, the defendants, by false representations, obtained an act of the legislature, passed the 27th March, 1809,† to enable the said trustees to supply the inhabitants of the village with pure and wholesome water. That the trustees applied to the plaintiff for leave to divert the stream, offering him a trifling and very inadequate compensation, which he refused. That the said trustees having obtained leave from the defendant *Hasbrouck*, the owner of the spring, to use and divert the water, or a part thereof, that is, a stream one inch and a quarter in diameter, taken from a great elevation, have commenced a conduit, and threaten to divert the stream, or a great part thereof, from the plaintiff's farm. That the plaintiff is apprehensive that if this is done, there will not, in a dry season, be water sufficient even for his cattle, &c. The plaintiff, therefore, prayed an injunction to prevent the defendants from diverting the water, &c. The bill was sworn to, and the plaintiff produced several affidavits, which stated that the stream was not more than sufficient for the distillery, brick yard, &c., of the plaintiff, and if diverted through a pipe, or tube, of the proposed diameter, would greatly injure if not render the works useless. One of the affidavits stated, that the whole stream would pass through a tube of one inch diameter, with a head of five feet.

*Burr.* and *J. V. N. Yates*, for the plaintiff.

THE CHANCELLOR. The statute under which the trustees of the village of *Newburgh* are proceeding, (sess. 32. ch. 119.) makes adequate provision for the party injured by the laying of the conduits through his land, and also affords security to the owner of the spring or springs from whence the water is to be taken. But there is no provision \*for making compensation to the plaintiff, through whose land the water issuing from the spring has been accustomed to flow. The bill charges, that the trustees are preparing to divert from the plaintiff's land, the whole, or the most part of the stream, for the purpose of supplying the village. The plaintiff's right to the use of the water, is as valid in law, and as useful to him, as the rights of others who are indemnified or protected by the statute; and he ought not to be deprived of it, and we cannot suppose it was intended he should be deprived of it, without his consent, or without making him a just compensation. The act is, unintentionally, defective,

1816.

GARDNER  
V.  
VILLAGE OF  
NEUBURGH.  
[\*163]

† Sess. 32. ch.  
119. Vol. 5.  
Webst. ed. 489.

[\*164]



1816.

GARDNER

v.

VILLAGE OF  
NEWBURGH.

The owner of land is entitled to the use of a stream of water that has run through it from time immemorial.

in not providing for his case, and it ought not to be enforced, and it was not intended to be enforced, until such provision should be made.

It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a water course is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy. (*F. N. B.* 184. *Moore v. Browne*, *Dyer*, 319. *b. Lutterel's case*, 4 *Co.* 86. *Glynne v. Nichols*, *Comb.* 43. 2 *Show.* 507. *Prickman v. Trip*, *Comb.* 231.)

Chancery has concurrent jurisdiction with Courts of law in cases of private nuisance.

The Court of Chancery has also a concurrent jurisdiction, by injunction, equally clear and well established, in these cases of private nuisance. Without noticing nuisances arising from other causes, we have many cases of the application of equity powers on this very subject of diverting streams. In *Finch v. Resbridge*, (2 *Vern.* 390.) the lord keeper held, that after a long enjoyment of a water course running to a house and garden, through the ground of another, a right was to be presumed, unless disproved by the other side, and the plaintiff was quieted in his enjoyment, by injunction. So, again, in *Bush v. Western*, (*Prec. in Ch.* 530.) a plaintiff who had been in possession, \*for a long time, of a water course, was quieted by injunction, against the interruption of the defendant, who had diverted it, though the plaintiff had not established his right at law, and the Court said such bills were usual. These cases show the ancient and established jurisdiction of this Court; and the foundation of that jurisdiction is the necessity of a preventive remedy when great and immediate mischief, or material injury, would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, upon just and equitable grounds, ought to be prevented. (*Anon.* 1 *Vern.* 120. *East India Company v. Sandys*, 1 *Vern.* 127. *Hills v. University of Oxford*, 1 *Vern.* 275. *Anon.* 1 *Vesey*, 476. *Anon.* 2 *Vesey*, 414. *Whitchurch v. Hide*, 2 *Atk.* 391. 2 *Vesey*, 453. *Attorney-General v. Nichol*, 16 *Vesey*, 338.)

This Court may issue an injunction to prevent the obstruction of an ancient water course, though the plaintiff has not established his title at law.

In the application of the general doctrines of the Court to this case, it appears to me to be proper and necessary that the preventive remedy be applied. There is no need, from what at present appears, of sending the plaintiff to law to have his title first established. His right to the use of the stream is one which has been immemorially enjoyed, and of which he is now in the actual possession. The trustees set

up no other right to the stream (assuming, for the present, the charges in the bill) than what is derived from the authority of the statute; and if they are suffered to proceed and divert the stream, or the most essential part of it, the plaintiff would receive immediate and great injury, by the suspension of all those works on his land which are set in operation by the water. In addition to this, he will lose the comfort and use of the stream for farming and domestic purposes; and, besides, it must be painful to any one to be deprived, at once, of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling. A right \*to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which no man can be disseised "but by lawful judgment of his peers, or by due process of law." This is an ancient and fundamental maxim of common right to be found in *Magna Charta*, and which the legislature has incorporated into an act declaratory of the rights of the citizens of this state. (*Laws*, sess. 10. ch. 1.)

I have intimated that the statute does not deprive the plaintiff of the use of the stream, until recompense be made. He would be entitled to his action at law for the interruption of his right, and all his remedies at law, and in this Court, remain equally in force. But I am not to be understood as denying a competent power in the legislature to take private property for necessary or useful *public* purposes; and, perhaps, even for the purposes specified in the act on which this case arises. But to render the exercise of the power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.

*Grotius*, (*De Jur. B. & P.* b. 8. ch. 14. s. 7.) *Puffendorf*, (*De Jur. Nat. et Gent.* b. 8. ch. 5. s. 7.) and *Bynkershoeck*, (*Quest. Jur. Pub.* b. 2. ch. 15.) when speaking of the *eminent domain* of the sovereign, admit that private property may be taken for public uses, when public necessity or utility require it; but they all lay it down as a clear principle of natural equity, that the individual, whose property is thus sacrificed, must be indemnified. The last of those jurists insists, that private property cannot be taken, on any terms, without consent of the owner, \*for purposes of public ornament or pleasure; and he mentions an instance in which the *Roman senate* refused to allow the prætors to carry an aque-

1816.

GARDNER  
V.  
VILLAGE OF  
NEWBURGH.

[ \* 166 ]

The legislature cannot take private property, without providing a fair compensation to the individual.

[ \* 167 ]

1816.

GARDNER  
V.  
VILLAGE OF  
NEWEBURGH.

duct through the farm of an individual, against his consent, when intended merely for ornament. The sense and practice of the *English* government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose, without the interposition of the legislature. And how does the legislature interpose and compel? "Not," says *Blackstone*, (*Com.* vol. 1. p. 139.) "by absolutely stripping the subject of his property, in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform."

I may go further, and show that this inviolability of private property, even as it respects the acts and the wants of the state, *unless a just indemnity be afforded*, has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of government.

Such an article is to be seen in the bill of rights annexed to the constitutions of the states of *Pennsylvania*, *Delaware*, and *Ohio*; and it has been incorporated in some of the written constitutions adopted in *Europe*, (Constitutional charter of *Lewis XVIII.*, and the ephemeral, but very elaborately drawn, constitution *de la Republique Française* of 1795.) But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the constitution of the *United States*, "that private property shall not be taken for public use, without just compensation." I feel myself, therefore, not only authorized, \*but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property; and I am persuaded that the legislature never intended, by the act in question, to violate or interfere with this great and sacred principle of private right. This is evident from the care which this act bestows on the rights of the owners of the spring, and of the lands through which the conduits are to pass. These are the only cases in which the legislature contemplated or intended that the act could or should interfere with private right, and in these cases due provision is made for its protection, or for compensation. There is no reason why the rights of the plaintiff should not have the same protection as the rights of his neighbors; and the necessity of a provision for his case could not have occurred, or it, doubtless, would

[\* 168]

have been inserted. Until, then, some provision be made for affording him compensation, it would be unjust, and contrary to the first principles of government, and equally contrary to the intention of this statute, to take from the plaintiff his undoubted and prescriptive right to the use and enjoyment of the stream of water.

In the case of *Agar v. The Regents' Canal Company*, (*Cooper's Eq. Rep.* 77.) an injunction was granted, on filing a bill supported by affidavit, restraining defendants acting under a private act of parliament, from cutting a canal through the land of the plaintiff, in a line and mode not supposed to be within the authority of the statute.

I shall, accordingly, upon the facts charged in the bill, and supported by affidavits, as a measure immediately necessary to prevent impending injury, allow the injunction, and wait for the answer, to see whether the merits of the case will be varied.

Injunction granted.

135

1816.

GARDNER  
V.  
VILLAGE OF  
NEWBURGH.

1816.

PORTER  
v.  
SPENCER.

\*G. and J. PORTER, *against* P. D. SPENCER.

In a matter of account of which this Court has jurisdiction, a writ of *ne exeat reipublica* may issue, though the plaintiff has sued the defendant at law, and held him to bail; and where a defendant, who had been sued at law, and held to bail, in a case not of equity jurisdiction, was about to depart from the state, *with his bail*, who had sold his property, the Court, from the necessity of the case, and to prevent a failure of justice, granted the writ.

To sustain a bill for an account, there must be *mutual demands*; not a single matter, but a series of transactions on one side, and of payments on the other.

September 27th.

THE bill, which was for an account and a *ne exeat*, stated that the plaintiffs were merchant tailors, and had sold clothing to the defendant on a credit of six months; that on the 1st of *January* last, there was a balance of account due to them from the defendant, with interest, of 317 dollars and 85 cents. To recover this sum, the plaintiffs had brought an action at law against the defendant, and held him to bail; and the defendant had pleaded the general issue, merely for delay. That the defendant's father was a special bail, and had, as the plaintiffs were informed, and verily believed, sold all his property in this state, and was about to remove permanently from the state. That the defendant was also about to remove immediately with his father, without leaving any property behind.

The bill was sworn to, and was accompanied also with an affidavit, as to the truth of the material facts charged.

*Henry*, for the plaintiffs.

[ \* 170 ]

THE CHANCELLOR. The general language of the cases prior to the time of Lord *Eldon* is, that the writ of *ne exeat* is not to be granted, if the demand be not purely and exclusively equitable. (*King v. Smith, Dickens*, 82. \**Brocker v. Hamilton, Dickens*, 154. *Pearne v. Lisle, Amb.* 75. *Anon.* 2 *Atk.* 210. *Crosley v. Marriot, Dickens*, 609.) If the demand be actionable at law, and the party can be arrested and held to bail, there is no necessity for the writ; and if the case be not bailable, the granting of the writ would be holding the party to bail, when the plaintiff was not entitled to bail at law. The *ne exeat* has accordingly been refused, when the demand was in prosecution at law, and not bailable, though the defendant was about to remove with his effects. (*Crosley v. Marriot, Dick.* 609. *Case of Gardner*, 15 *Vesey*, 444.)

But where a defendant, after a verdict at law, and before judgment, was threatening to go beyond sea, the *ne exeat* was allowed in an early case, (*ex parte Bruncker*, 3 P. Wms. 312.) by the master of the rolls, though Lord Talbot afterwards discharged the writ, and on the ground, principally, that no bill was filed. He added, also, "that the writ ought not to be made use of where the demand is entirely at law, for there the plaintiff has bail, and he ought not to have double bail, both at law and in equity."

The import of this case is, that the rule against the allowance of the writ, where the matter was of legal cognizance, was not then understood to be inflexible, but would be made to yield to cases of necessity, when justice would be defeated without the aid of the writ. In *Atkinson v. Leonard*, (3 Bro. 218.) Lord Thurlow laid down the rule, that if chancery had concurrent jurisdiction, as in the case of a lost bond, it was sufficient to authorize the writ, if the demand was an equitable one; and he granted it as a measure to compel the party to give security to abide the decree; and Lord Loughborough only doubted, in *Russel v. Asby*, (5 Vesey, 96.) whether the *ne exeat* would lie when the defendant might be held to bail at law.

Since the time of Lord Eldon, however, it has become settled in the *English* chancery, that though the plaintiff may sue at law for the balance of an account, and hold the party to bail, yet, as chancery holds a concurrent jurisdiction upon the head of account, the plaintiff may have the *ne exeat*, on a positive affidavit of a threat or purpose of going abroad, even though the defendant's general residence was abroad. (*Jones v. Alephsin*, 16 Vesey, 470. 11 Vesey, 54. and 1 Ves. & Beame, 132, 133. *Howden v. Rogers*.) In *Amsinck v. Barklay*, (8 Vesey, 594.) the defendant was arrested at law, and surrendered into custody; he was then held to bail on *ne exeat* for the same sum, and afterwards discharged in the suit at law for want of proceeding. The *ne exeat* was discharged on the ground that the defendant had first been arrested at law and kept in custody, and then discharged; and in *Jones v. Sampson*, (8 Vesey, 593.) the chancellor admitted his authority to grant the writ where the jurisdictions were concurrent; but he observed, (p. 598.) that if the plaintiff was actually arrested at law, he would not grant the writ.

In the present case, I have some doubts, whether the bill states a matter of account on which the jurisdiction of the Court can attach. To sustain a bill for an account, there must be *mutual demands*, and not merely payments by way of set-off. A single matter cannot be the subject of an ac-

1816.

PORTER  
v.  
SPENCER.

When a *ne exeat* *republica* may issue.

[ \* 171 ]

To sustain a bill for an account, there must be *mutua*

1816.

PORTER  
v.  
SPENCER.

*demands; or a  
series of trans-  
actions on one  
side and of pay-  
ments on the  
other.*

[ \* 172 ]

count. There must be a series of transactions on one side, and of payments on the other. (*Dinwiddie v. Bailey*, 6 *Vesey*, 136. and *Wells v. Cooper*, there cited.) I place my interference on the necessity of the case. From the facts charged and sworn to, it appears to me that the remedy in the suit pending at law would be absolutely defeated without the interposition of this Court. The books assume and admit principles that will justify the allowance of the writ under the peculiar circumstances of the present case. The remedy sought is indispensable to prevent a failure of justice, and this creates a marked difference between this and the ordinary cases. I should think it would reflect discredit on the administration of \*justice, if the plaintiff could find no relief from the impending mischief arising from a failure of the remedy at law, by the immediate removal of the defendant and his bail. I have no option or discretion to refuse the writ, when a case is brought within the established rules of the Court.

This is not holding a party to bail when he is not entitled to it. Nor is there double bail, for the first bail is going abroad with all his effects, and that too in connection with the defendant; and though I am not free from diffidence, as to the view I have taken of this case, I feel myself bound to declare, from the best judgment I can form at present, that a *ne exeat* ought to be granted. (a)

Writ of *ne exeat* granted in the sum of 500 dollars.

(a) Vide *Seymour v. Hazard*, vol. 1. p. 1, 2.

1816.


 MASON  
v.  
SUDAM.
MASON and others *against* SUDAM and others.

The act of the legislature, passed the 11th of *April*, 1808, for the relief of *James Kain* and *Stephen Rea*, executors of *David Rea*, deceased, late sheriff of *Ulster*, did not authorize them to sell property under an execution, the execution of which had not been commenced by the deceased sheriff.

And the amount of a judgment and execution, with the sheriff's fees, being tendered by a master in chancery, on a sale of land, under a decree in favor of a subsequent mortgagee, and refused, a sale afterwards, under the judgment and execution, by the agent of the executors of *R.*, is wrongful and void.

Where the master sold a parcel of the land under a decree, with the assent of the agent of the executors of *Rea*, and a mutual understanding that the sale should be valid, and the execution be satisfied by the master out of the proceeds of such sale, and that was made known to the purchasers at the time; and the agent of the executors of *R.* afterwards sold the land, under the execution, to persons who knew all the circumstances, such subsequent sale was held to be fraudulent and void.

THE bill, in this case, was to set aside a conveyance made to the defendants *Sudam* and *Elmendorf*, under an \*execution directed to the sheriff of *Ulster* county. *B. Gardener*, being indebted to the executors of *N. Evertson*, deceased, (plaintiffs,) in the sum of 2,000 dollars, on the 5th of *October*, 1807, executed a mortgage to them of certain lands in *Hurley*, in the county of *Ulster*. The executors, afterwards, filed a bill to foreclose the mortgage, which was taken *pro confesso*. They stated that they were ignorant that the mortgaged premises were encumbered by any judgment until the master was about to sell. That a judgment at the suit of *Newkirk* and others v. *Newkirk*, docketed the 3d of *January*, 1806, for 190 dollars and 56 cents, bound the premises. That an act of the legislature was passed the 11th of *April*, 1808, for the relief of *James Kain* and *Stephen Rea*, stating that they were bail for *David Rea*, late sheriff of *Ulster*, and were his executors; that the said sheriff had made sales, but had given no deeds; had executions in his hands, the execution of which was commenced, but not completed, at the time of his death, and that many other duties and things pertaining to his office, which were commenced, remained unfinished; and thereby authorizing them, *K.* and *R.*, to execute deeds for lands sold, and to do and perform every duty, matter, and thing, in relation to the said office, as fully as *D. R.* might do, if living, provided they gave security, &c.

September 30th.

[ \* 173 ]

The bill further stated, that they gave security; that a *fi. fa.*



1816.

MASON  
v.  
SUDAM.

[\* 174]

issued on the judgment which was delivered to the said sheriff, in his lifetime, but he did not commence the execution of it by levying on the said lands, so that the executors of the sheriff had no authority, as the bill alleged, to sell, &c. That the premises were advertised for sale by the master, under the decree, on the 12th of *May*, 1814, but the sale was postponed to the 23d of *May*, when it took place. That, until the day before the sale, neither the master, nor the executors of *Evertson*, knew of the judgment, execution, or levy; the master was then informed, by the sheriff, of the judgment, and that he had advertised \*part of the premises for sale under the execution, which he had postponed to the 23d of *May*, and that there was due on the execution the sum of 315 dollars; that he proceeded not as sheriff, but as agent of *K. and R.*, who acted under the act. The master agreed with the sheriff to sell the part of the premises (advertised under the execution) under the decree, free and discharged from the judgment; and out of the proceeds, to retain sufficient to pay the judgment: that this agreement was made known to all the persons present, and the master sold the part of the premises which had been advertised by the sheriff, for 2,006 dollars and 35 cents, out of which he retained 315 dollars to satisfy the judgment. That the sheriff considered the land so sold as discharged of the judgment, and promised to procure a deed from the executors of *Rea*. That the postponement of the sale by the sheriff, to the 23d of *May*, was made at the instance of *Sudam*; that the master adjourned the sale of the *residue* of the premises to the first of *June*, and left in the hands of a third person the 315 dollars, until that time; that after the sale above mentioned, on the same day, *C. E. Elmendorf*, defendant, informed the master, that the sheriff, or agent of the executors of *Rea*, had sold the *part* of the premises to him for 400 dollars; that the judgment was for 190 dollars and 56 cents only. That the master attended on the 1st of *June*, to sell the *residue* of the premises, and to satisfy the judgment, when he was informed, that the difference between the 190 dollars 56 cents, and 315 dollars, consisted of interest, which he was not authorized to pay, and there were no directions endorsed on the execution to levy interest, but only 190 dollars and 56 cents, and sheriff's fees; that the master offered to pay this sum, which was refused. That the master then proposed to refer the question to the executors of *Evertson* at *New-York*, to which the sheriff assented. That the master, on the 1st of *June*, sold the *residue* of the premises for 474 dollars, which, with the proceeds of the former sale, was not sufficient to satisfy \*the mortgage debt. That after the 1st of *June*, and after the above proposal was made

[\* 175]

and accepted, the sheriff, as agent of the executors of *Rea*, without the knowledge of the plaintiffs, or of the master, collusively sold the said *part* of the premises, for 600 dollars, to *Sudam*, defendant, who made the purchase for himself, *C. E. Elmendorf*, and *J. Burr*; and that the executors of *Rea* executed a conveyance accordingly. That those purchasers, at the time, well knew of the agreement between the master and sheriff; that such sale was fraudulent and irregular, not having been duly adjourned to the 1st of *June*, or regularly advertised, and the same land had been before sold to *Elmendorf*, on the 23d of *May*. That the executors of *Rea*, before they executed the deed to *Sudam* and the others, were informed, by letter, of all the above circumstances. That *S. E.* and *B.* have since sold the same land to others, who knew, at the time, of the circumstances, and had brought an action of ejectment, &c. The bill prayed that the sale to *Sudam*, *E.*, and *B.*, and the subsequent sales by them, might be set aside as fraudulent and void; that upon payment, by the master, of the 190 dollars and 56 cents, and the sheriff's fees, the judgment and execution might be deemed satisfied, and the executors of *Rea* be directed to convey to the purchasers under the master's sale, all their right under the judgment; and that *Sudam* and others may account for the rents and profits to the purchasers under the master, and that *Sudam* and others, and those holding under them, may be enjoined from selling, or committing waste, &c.

The answer of the defendants did not admit that the executors of *Evertson* had no notice of the judgment of *Newkirk*, but, on the contrary, alleged, that some of them had notice of it before the 22d of *May*, 1814. They averred, that the master promised to satisfy the sheriff the amount of the judgment out of the sale, and that the sheriff desisted from proceeding on the 23d of *May*, to see if the \*master would fulfil his promise. The defendants *Sudam* and *Burr* averred, that such agreement was true; that the sheriff, at the time, offered the *part* of the premises for sale, and showed the execution, and that the purchasers under the master knew of the judgment and execution before the sale by him. They denied any agreement that the *part* so sold should be free of the *lien*, &c., unless the master, immediately after the sale, and before it was exposed for sale by the sheriff, paid the amount due on the judgment. *Sudam*, defendant, stated, that he attended, on the 23d of *May*, in behalf of the persons interested in the judgment, and then understood, from the master and the sheriff, that the master would pay the execution out of the moneys arising from the sale, immediately thereafter, or that the sheriff would proceed to a sale under the execution; and that this agreement was publicly

1816.

MASON  
V.  
SUDAM.

[\* 176]

1816.

MASON  
V.  
SUDAM.

proclaimed by the master. That the master, after the sale, did not pay the judgment, and the sheriff, on the same day, offered the lands for sale, and *D. B.* bid 316 dollars, and the sale was then adjourned to the next day. *Elmendorf*, defendant, stated, that at the sale, on the 24th of *May*, he bid 400 dollars, and the sale was then postponed, by his consent, and subject to his bid, to the 1st of *June*, to see if the executors of *Evertson* would satisfy the judgment. *Sudam* said, that he did not attend the two last-mentioned days; and he and *Elmendorf* stated, that the master had received the purchase money, before the sale by the sheriff.

*Sudam* further stated, that on the 1st of *June*, he understood that the master had sold the residue of the land for 424 dollars, and believing that the execution had been satisfied, he did not attend at the adjourned sale of the sheriff; but afterwards, between 12 and 1 o'clock, being informed by the sheriff otherwise, and requested by him to attend, he attended the sale, and bought the first part of the premises for 655 dollars; that there was nothing fraudulent in the sale, but on the contrary, it was fair, and made *bona fide*; that the purchase was for the joint benefit of himself and *Elmendorf*; that on the 5th of *June* they sold one third of the land to *J. Burr* for 350 dollars, to whom they gave a deed, and received a reconveyance from the executors of *Rea*. That the only agreement known to them was, that the master should satisfy the judgment immediately after the sale, which he had not done.

[ \* 177 ]

A witness for the plaintiffs, *S. Bruyn*, testified, that he was present at the sale by the master, and that some person proposed that the sale should be joint under the mortgage and judgment, and to commence with the former bid, and the purchaser to take a title under the master and sheriff, which proposition appeared to be acceded to by them. When the property was struck off by the master, he proposed, with the apparent approbation of the sheriff, to deposit 315 dollars with the witness, being the amount claimed by the sheriff, to remain until the master could write to the executors of *Evertson*, and obtain their consent; that on the 1st of *June*, after the sale by the master, he offered the sheriff to pay him the amount of the execution, and his fees, which he refused, unless the interest was also added; and the master said he had no authority to pay the interest, and offered to leave it with the witness, until the consent of the executors of *Evertson* could be procured, but the sheriff expressed no assent to the proposal; that the sheriff, soon after, sold the land to *Sudam*, for 655 dollars, and then said to the master and witness, that *Sudam* would give up the purchase, if the interest was paid, the object being to secure

the interest ; that *Sudam*, at the time of the purchase, knew of the difference between the master and sheriff. That on the 13th of *June*, according to his instructions from the executors of *Evertson*, he tendered the amount of the judgment, with the interest, to *Sudam*, who refused to accept it.

1816.

MASON  
V.  
SUDAM.

*Dodge*, the master, who was a witness, testified, that the agreement between him and the sheriff was, that the judgment \*should be paid out of the master's sale, and that the master and sheriff should each give a deed to the purchaser. That the witness offered to deposit with *Bruyn* the amount of the *fi. fa.*, to abide the orders of the executors of *Evertson*. That this proposal appeared so satisfactory that no difficulty was suggested. That *Sudam* was present, and knew of every circumstance relative to the claim of the sheriff, and the agreement ; and that before the sale on the 1st of *June*, the witness informed *Sudam* of the question between him and the sheriff ; that he received the purchase money, executed a deed, and deposited 315 dollars with *Bruyn*. That on the 31st of *May* he received the direction of the plaintiffs to pay the amount of the execution, and he offered the sheriff 191 dollars and 50 cents, with his fees, but the sheriff refused to receive it without the interest. That the witness then said he would deposit the money with *Bruyn*, and wait for further directions, to which the sheriff either expressly assented, or induced the belief of the witness that he did assent.

[ \* 178 ]

*Riggs*, for the plaintiffs, raised the following points: 1. That the act of the legislature mentioned, did not authorize the executors of *Rea* to make any sale under an execution, which had not been begun to be executed by the sheriff in his lifetime ; and that the sale was, therefore, void.

2. That this Court, after a decree for the sale of the mortgaged premises, will not allow a sale at law, under a judgment. (2 *Schoale & Lefroy*, 398.)

3. That the agreement between the master and the sheriff *Dubois* was binding, and the sale by the sheriff, afterwards, was fraudulent.

4. That the sum really due on the judgment, being tendered, ought to have been received.

5. That the purchasers under *Sudam* had notice.

6. That the sale of the sheriff, &c., ought to be adjudged fraudulent and void, and the amount of the judgment paid \*out of the proceeds of the master's sale, and a satisfaction entered upon the judgment, and that the defendants should pay the costs.

[ \* 179 ]

1816.

MASON  
V.  
SUDAM.

*Harison*, for the defendants, insisted, 1. That there was no fraud in the defendants.

2. That if there was any fraud in any person, it must have been in *Dubois*, the sheriff, and he was not made a party, nor his representatives.

3. That the agreement, if any, between the master and *Dubois*, was merely verbal, and made without authority from the defendants.

4. That *Sudam* and *Elmendorf* were not trustees for the plaintiffs; and the purchasers under them are *bona fide* purchasers without notice of the fraud, and the plaintiffs not entitled to redeem; and that the bill ought to be dismissed with costs.

THE CHANCELLOR. There are several objections to the sale by the executors of *David Rea*, each of which appears to me to be well founded.

1. The sale was not authorized by the act of the 11th of *April*, 1808. That act only intended to authorize the executors to finish those executions of which "the execution had been commenced by their testator, and had not been completed." This was the object of their application to the legislature, and the act was not intended to be broader than the case required. It is most reasonable to give it such construction, for there was no necessity of any more extended provision, as the constitution and general law of the land had provided a known, suitable, and responsible officer for the execution of all process that had not already been acted upon. If a sheriff seizes property under execution, and dies before the execution is completed, his representatives are responsible for the property sequestered; and it was fit and proper that they should \*have the power to discharge the trust. It was accordingly the old and settled rule of law, that an execution was an entire thing, and when once acted upon, as by taking the property into possession, or, perhaps, by advertising it for sale, the person who thus began it must finish it, otherwise there would be great inconvenience to the sheriff and the party, and what had been done would be defeated and rendered of no avail. (*Ayre v. Aden*, Cro. J. 73. *Clerke v. Withers*, 1 Salk. 322. 2 Ld. Raym. 1072. *Wilcox, &c. v. Pokinhorn*, 1 Barnadis. 81. Lord Mansfield, in *Cooper v. Chitty*, 1 Black. Rep. 65.) In this case, there was no personal property which had been seized under the execution, and there was no act done, or step taken, in respect to the real estate. There was nothing which could be said to have been a commencement of the execution of the writ by the deceased

[ \* 180 ]

sheriff. The execution had lain dormant in the hands of a deputy, until after the return day, and until after the death of the sheriff. The case was, therefore, not within the reason of the rule of the common law, nor within the purview of the act.

2. The master, as agent for the plaintiffs, had offered to the agent of the executors the amount of the execution and the fees before the sale, and that offer had been rejected. The subsequent sale was, therefore, entirely in their own wrong. They had no right to demand any more than the amount of the execution, nor to levy interest on the judgment. This was the well-known and settled rule of law. (*Watson v. Fuller*, 6 *Johns. Rep.* 283.) The act (sess. 36. c. 203. s. 50.) evidently recognizes the rule, and only makes provision for interest to be collected on judgments *thereafter* to be recovered. The act did not apply to this case, and the parties stood upon their legal rights as they then existed. These facts were all known to the defendant *Sudam*, and to those who hold under him, at the time that they purchased.

\*3. The special circumstances under which the sale was made, and which were also known to the purchasers, form, of themselves, strong ground for equitable relief.

The master sold one parcel of the land on the 23d of May, in the presence, and with the assent of the agent of the executors of *Rea*, and with a mutual understanding, (and that known to the purchasers,) that the sale should be valid, and that the execution was to be satisfied out of the proceeds. This agreement is sufficiently proved by the testimony of *Bruyn* and *Dodge*. If that agreement had not afterwards been complied with on the part of the plaintiffs, it would have been the duty of those claiming under the execution, to have applied to this Court, which had the direction and control of those proceeds. But that agreement was disregarded on the part of the agent of the executors of *Rea*, and the land sold under the execution, in violation of the rights of the plaintiffs, as well as of those who had purchased under the decree. The defendant *Sudam*, before he purchased, knew of the prior sale by the master, and of the agreement between the master and the agent of the executors of *Rea*, that the execution was to be satisfied out of that sale. He is, therefore, chargeable with a previous knowledge of all the equity of the case, and so are those who took under him. The sale, under all its circumstances, cannot be countenanced, nor can I suffer it to stand.

I shall, accordingly, decree, that the sale by the executors of *Rea* be set aside, as null and void; and that the amount

1816.

MASON  
V.  
SUDAM.

[\* 181]

1816.

DEY  
v.  
DUNHAM.

of the judgment be paid out of the proceeds of the master's sales; and that satisfaction of the judgment be entered, and that all the defendants, except *Justus Burr*, be decreed to pay costs.

Decree accordingly.

[\* 182]

\*DEY *against* DUNHAM.

Where a deed, absolute on the face of it, is recorded *as a deed*, and afterwards the grantee executes a *defeasance*, which is not registered or recorded, the defeasance connected with the first deed is considered as a *mortgage*, and must be registered as such, to give it priority over a subsequent deed to a *bona fide* purchaser. The record of the absolute deed, as such, is no *notice* to a subsequent purchaser.

Where a debtor conveys all his estate, real and personal, in *trust* for all his creditors, such *trustee* is considered as a *bona fide* purchaser. Though there is a *schedule* annexed to the assignment in trust, which mentions that the title to the land was in the defendant, (the grantee in the original deed,) and that he held it as collateral security to pay certain notes, this is not a sufficient *notice* to the trustee.

It must be such a *notice* as, with attending circumstances, will affect the subsequent purchaser with actual fraud. A *notice* enough merely to put the party on inquiry, is not sufficient to break in upon the registry act.

This Court will order a defendant to account for moneys overpaid, beyond the legal interest, in pursuance of a usurious contract. The defendant cannot, at the hearing, avail himself of the *limitation* in the act against *usury*, unless the same has been pleaded or insisted on in his answer.

Where the defendant advanced his notes to the plaintiff for his notes for the same sums, payable at or near the same periods, for which exchange the defendant received a *commission of two and a half per cent.* on the amount, and the notes when they became due were renewed, and new notes given in exchange, and this renewal and exchange were repeated many times, and the defendant, on each renewal and exchange, received a *commission of two and a half per cent.*, but which was less than the lawful interest on the amount of the notes for each time they had to run; this was held not to be *usury*, but a compensation only for a loan of credit and risk. But if the defendant had taken lawful interest for the time the notes had to run, and had exacted the *commission* in addition, it would have been *usury*.

The recitals in a *decree* should not be argumentative, but state merely the conclusions of law and fact. Where a deed is set aside as constructively fraudulent, it is usual to direct a release and reconveyance by the party claiming under the deed, with a covenant against his own acts. A deed charged in the bill, and admitted in the answer, may be read at the hearing, without having been made an exhibit before the master.

September 31st,  
and  
October 11th.

THE bill stated, that *M. & W. Ward*, booksellers, and partners, being seised of fifty lots of land in the 9th ward

1816.

DEY  
v.  
DUNHAM.  
[ \* 183 ]

of the city of *New-York*, on the 27th of *January*, 1810, conveyed the same to the defendant, by an *absolute* deed, but \*which was intended only as security for some temporary purpose, or if for security for money due, it was for money due on a usurious contract; and the temporary purpose (if any) for which the deed was given, was accomplished before the 27th of *July*, 1810, when the deed remained uncanceled in the defendant's hands; and, on that day, a *writing* was executed under the hands and seals of *M. Ward* and the defendant, reciting that *M. & W. Ward* were indebted to the defendant, in the sum of 10,000 dollars, on three notes, dated the 24th, 25th and 26th *July*, 1810, payable six months after date; and that they, *M. & W. Ward*, had deposited with the defendant three notes, made by *Robert Bache & Co.*, for 1,408 dollars 41 cents each, payable in 9, 11, and 13 months, to *M. & W. Ward*, and endorsed by them; and declaring, that if the said notes of *M. & W. Ward*, for 10,000 dollars, should be regularly paid, the conveyance for the 50 lots should be reconveyed, and the notes of *Bache & Co.* be given up; but if the notes should not be paid, then the notes of *Bache & Co.* should remain as security, and the defendant might sell the lots and collect the notes of *Bache & Co.* to obtain payment of the sum due the defendant. That the deed for the 50 lots was not registered; that the *writing*, declaring the 50 lots to be security only, was never registered or recorded, and therefore, under the act concerning mortgages, was void, even as a mortgage.

That *M. & W. Ward*, on the 17th of *June*, 1811, gave to the defendant two notes, one dated the 25th of *May*, 1811, for 3,333 dollars and 33 cents, payable in 60 days, and the other dated the 12th of *June*, 1811, for the same sum, payable in 90 days; and on the 25th of *June*, they gave to the defendant a third note for the like sum, payable in 30 days, which notes were made and received in lieu of the three notes first mentioned, which are yet retained by the defendant; that on the 17th of *June*, 1811, when the two \*notes were given, the defendant, by *B. Edgar*, his agent, gave *M. & W. Ward* a receipt, admitting that they were given on account of the three first notes, and when the third note, of the 25th of *June*, was given, the same agent endorsed a receipt for it on the other receipt. That when the three last notes were given, *M. & W. Ward* paid up all the interest on the first notes, and a large sum besides, for usury, beyond the legal interest; that the three last-mentioned notes were regularly paid as they became due, and are now in possession of the plaintiff; that if the deed for the 50

[ \* 184 ]



1816.

DEY  
v.  
DUNHAM.

lots could not have been of any force as security, the same was wholly discharged by the payment of the last notes.

That on the 11th of *May*, 1812, *M. & W. Ward* assigned to the plaintiff all their estate, real and personal, in trust, for the benefit of their creditors, part of which real estate was the 50 lots mentioned; and by another deed, dated the 16th of *November*, 1812, *M. & W. Ward* confirmed to the plaintiff the 50 lots, in trust, &c. That the plaintiff, considering the deed to the defendant as discharged by the payment of the notes, on the 19th of *November*, 1812, gave notice to the defendant of the assignment to the plaintiff, and requested the defendant to give up the deed for the lots, and the three first notes, to be cancelled. That between the 27th of *January*, 1810, and the date of the assignment to the plaintiffs, *M. & W. Ward* had various dealings with the defendant, by exchanging notes, the defendant giving to them his notes for different sums, at different periods of payment, and receiving, at the same time, their notes payable at the same or different periods, upon which transactions, under the name of *commissions*, the defendant extorted from them above 200 dollars for usury, over and above the legal interest, and for which the defendant had become accountable to *M. & W. Ward*, and to the plaintiff, as their assignee. The plaintiff \*prayed that the defendant might be decreed to deliver up the deed of the 27th of *January*, 1810, and to release to the plaintiff all his interest in the lots of land, and also to account for the sums received by him for usury.

[\* 185]

The defendant, in his *answer*, admitted the facts stated in the bill, as to giving the three notes by *M. & W. Ward*, on the 27th of *January*, 1810, and the deed for the 50 lots, which was absolute in terms, but intended only as security, but denied that the deed was given on any usurious or illegal contract. He stated, that in *February*, 1810, he reconveyed two of the lots to *M. & W. Ward*, who sold them for 400 dollars, which was received by the defendant; and he denied that the purposes of the deed were yet fulfilled. The defendant further said, that on the 25th of *July*, 1810, *M. & W. Ward* applied to him to renew the first notes, and that he did so, by giving his three notes for the same sums as the notes made in *January*, dated the 26th, 27th, and 28th of *July*, 1810, at six months, and receiving three notes of *M. & W. Ward*, dated the 24th, 25th, and 26th of *July*, two for 3,000 dollars each, and one for 4,000 dollars, payable six months after dates; and they left the deed for the 50 lots in the defendant's hands, and deposited with him two notes of *Bache & Co.*, amounting to 2,816 dollars and 83 cents; that

the notes of *M. & W. Ward* were dated first, to enable the defendant to collect them, before his own fell due, or to sell the lots of land; that *M. & W. Ward* got the notes of the defendant, last mentioned, discounted, and, with the money so raised, took up the notes of the 27th *January*, 1810. The defendant admitted the writing by way of defeasance; and said, that the three last mentioned notes of *M. & W. Ward* were not paid, they having failed before they became due, and that the notes were now in possession of the defendant. He denied all *usurious* transactions with *M. & W. Ward*, or receiving from them interest beyond seven per cent. \*for loans. He said that the deed of the 27th of *January*, 1810, though not registered as a mortgage, was recorded as a deed, on the day of its date; but the writing given as a defeasance was never registered or recorded. That in *July*, 1810, *M. Ward* proposed to the defendant to raise 10,000 dollars for him on his notes, and prevent a sale of the lots, and the defendant issued notes for that purpose. The defendant denied that *M. & W. Ward* gave to him, on the 17th of *June*, 1811, the new notes mentioned in the receipt signed by *Edgar*; but said that they gave him three notes, one for 3,333 dollars and 33 cents, dated the 25th of *May*, 1811, payable in 60 days, for which they received the note of the defendant for the same sum, dated the 28th of *May*, at 60 days; and one for the same amount, dated *June* 12th, at 90 days, for which they received his note for the same sum, dated the 15th of *June*; and one for the same amount, dated the 24th *June*, at 30 days, to meet a note of the defendant to *M. & W. Ward*, payable in five months from *February* 28th, 1811; which three notes the defendant believed were the three notes referred to in the bill; and he denied that he received any notes of *M. & W. Ward*, dated the 17th and 25th of *June*, as charged. That when the proposal was made to raise money on the notes of the defendant, *M. Ward* agreed that the notes of *M. & W. Ward*, given in *July*, 1810, should be retained by the defendant, until the debt was paid, because they corresponded with the notes described in the defeasance, and the deed and defeasance were also to remain in force, until the debt was paid. He denied that their notes of the 25th of *May*, and 12th and 24th of *June*, were given or received in lieu of the notes of *July*, 1810.

He admitted, that about the time *M. & W. Ward* made their notes of the 25th of *May*, and 12th of *June*, *Edgar*, as agent for him, gave a receipt for the same, and also a receipt for the note of the 24th of *June*; and that when they gave those notes, they paid up the interest on their \*notes of *July*, 1810, but no usury; and that they paid the

1816.

DEY  
V.  
DUNHAM.

[\* 186]

[\* 187]

1816.

DEY  
v.  
DUNHAM.

notes of *May* and *June*, 1810, to him. He admitted the assignment to the plaintiff in trust, but denied that the plaintiff did not know the real situation of the defendant's claims; that he received the notice from the plaintiff of the 18th of *November*, 1812, but knew nothing of the deed of the 18th of *November*. He admitted that between the 27th of *January*, 1810, and the assignment, *M. & W. Ward* had various dealings with him by way of exchanging notes; but he denied that he extorted any sum above lawful interest, under the name of commissions; that he, however, received from them, by agreement, and in the course of trade, commissions from a half, to two and a half per cent., not as usury, but as an allowed mercantile compensation.

*M. Ward* (who had released all his interest) was examined as a witness for the plaintiff, and proved the facts as stated in the bill relative to giving and renewing the notes. He stated that the notes of *M. & W. Ward* were given for notes of the defendant for the like sums, in exchange, the former being dated earlier, so that they might become due before those of the defendant; that they agreed to pay, and did pay, the defendant two and a half per cent. commissions for the exchange of the notes, and that on the further exchanging of notes between them, the like commission was paid, or included in the amount of their notes, or discounted from the notes of the defendant: that the business of exchanging notes as they became due continued for some time, and, on every occasion, the commission was paid to the defendant. That the commissions paid by *M. & W. Ward* to the defendant on the various exchanges of notes, until the time of their failure, was 1,200 dollars; but that for all exchanges, &c. other than on the notes above mentioned, the sums paid for loans of defendant's notes, but not for money lent, amounted to above 7,000 dollars.

[\* 188]

\**N. B. Edgar*, a witness, stated also the agreement as to the two and a half per cent. commission for advancing notes, &c. That it was agreed, that, when the first notes were taken up, the deed, &c. was to be delivered up; but *M. & W. Ward* having, afterwards, borrowed other notes of the defendant to take up their notes, it was further agreed that the deed should continue as collateral security for the new notes; and on the renewal of the notes the defendant had the same commission, as on advancing the original notes. That after the notes of *M. & W. Ward* fell due in *January*, 1811, it was agreed, that those notes should remain in the hands of the defendant until after the sale of the lots, or until all the subsequent notes should be paid:

that the last notes were not to be in lieu of the three first notes.

1816.



DEY  
v.  
DUNHAM.

*Riggs*, and *S. Jones, jun.*, for the plaintiff.

*T. A. Emmet*, for the defendant.

At the hearing, the counsel for the plaintiff offered to read the deed of assignment to the plaintiff, in *trust*, without its being made an exhibit, or being proved before the examiner, on the ground that it was admitted in the defendant's answer.

A deed charged in the bill and admitted in the answer, may be read at the hearing, without having been made an exhibit, &c

The defendant's counsel objected, that the deed had not been made an exhibit, nor had any notice been given of an intention to produce or read it.

THE CHANCELLOR. A deed charged in the bill, and admitted in the answer, may be read at the hearing, without being an exhibit before the examiner, and without a previous notice or rule to produce and prove it at the hearing. The case is not within the reason of the general rule of practice on the subject, and there can be no surprise on the defendant.

September 31st.

\*THE CHANCELLOR. The first and principal question is, whether the assignment to the plaintiffs will carry the title to the 50 lots, in preference to the prior deed to the defendant.

[ \* 189 ]  
October 11th.

The deed to the defendant of the 50 lots was, on its face, an absolute deed, in fee, with full covenants, and it was acknowledged and recorded, as a deed, on the day of its date. It is admitted, however, that the deed was taken in the first instance as a security for the payment of three notes, to the amount of 10,000 dollars, payable in six months, and bearing date about the same time with the deed, in *January*, 1810. Afterwards, on the 27th of *July*, 1810, and about the time that the notes became due, other notes were given in lieu of them, and an agreement under seal executed by the defendant, admitting that the deed of the 50 lots was only held as a security, and that if the substituted notes were paid, the deed was to be given up, and the lots reconveyed. This agreement, operating as a defeasance or explanation of the design of the deed, was never registered, yet it is to be considered in connection with the deed, and relates back to its date, so as to render the deed, from its commencement, what it was intended to be by the parties, a mere mortgage, securing the payment of the notes.

As a mortgage, the deed and the subsequent agreement

1816.

DIX

v.  
DUNHAM.

An absolute deed with a defeasance is a mortgage; and must be recorded as such to give it priority.

The record of the deed, only, is no notice.

[ \* 190 ]

A notice that is to break in on the registry act, must be such as, with the attending circumstances, will affect the subsequent purchaser with fraud.

A notice merely to put the party on inquiry is not sufficient for that purpose.

ought to have been registered, to protect the land against the title of a subsequent *bona fide* purchaser. This is the language of the statute concerning the registry of mortgages; and recording the deed, as a deed, was of no avail in this case, for the plaintiff was not bound to search the record of deeds, in order to be protected against the operation of a mortgage.

The plaintiff is to be considered as a *bona fide* purchaser.

A conveyance in trust to pay debts is a valid conveyance founded on a good consideration. (*Stephenson v. Hayward, Prec. in Ch.* 310.) Nor do I think that the plaintiff is chargeable with notice sufficient to postpone the operation of his assignment in trust. All the notice in the case is contained in the schedule to the assignment, stating that the title to the 50 lots is, in the name of the defendant, given as collateral security to pay certain notes. The notice that is to break in upon the registry acts must be such as will, with the attending circumstances, affect the party with fraud; and here is certainly no fraudulent intention to be imputed to the plaintiff. The ground of the numerous decisions on this subject seems to be, the actual fraud of the party in taking a second conveyance with knowledge of the first, and with intent to defeat it. There may possibly be cases, as Lord Hardwicke observes in *Hine v. Dodd*, (2 Atk. 275.) in which the registry acts are set aside upon notice devested of fraud; but then the proof must be extremely clear. In this case, the notice arising from the schedule was lame and defective. There was no notice as to the amount of the notes, or how many, or when payable; whereas every registry of a mortgage must specify, with certainty, the mortgage money, and when payable. The plaintiff in this case might not have inferred from the schedule that the defendant held any thing more than a nominal title, and, perhaps, as a mere trustee upon some extinguished debt. It was not even said to be a subsisting debt. If notice that is to put a party upon inquiry be sufficient to break in upon the policy and the express provisions of the act, then, indeed, the conclusion would be different; but I do not apprehend that the decisions go that length. This would be too slight a foundation to act on in opposition to the statute. Here is no evidence that any possession was ever taken under the mortgage. There was nothing except the loose information in the schedule; and under such an equitable and meritorious assignment as this, I do not deem that sufficient to render the assignment fraudulent in the hands of the plaintiff. Nothing can be stronger than the language of Lord Alvanley in *Jolland v. Stainbridge*, (3 Ves. 478.) "The person," he says, "who takes subsequently, must know exactly the sit-

[ \* 191 ]

uation of the prior deed, and have meant to defraud." All the cases appear to me to turn upon fraud resulting from the notice.

This is one of the last cases in which the doctrine of notice ought to be pressed with much strictness. The assignment was for a just and meritorious purpose, in which the defendant was included, and the defendant had taken an absolute deed, and recorded it as such, though he secretly intended it only for a mortgage, and he afterwards gave a separate defeasance. Lord *Talbot* said, (*Cas. temp. Talbot*, 89.) that this was not a proper practice, and ought to be discouraged. "To me," he observes, "it will always appear with the face of fraud, for the defeasance may be lost, and then an absolute conveyance is set up." Here the party did not even give a concurrent defeasance. He takes an absolute deed, and records it as an absolute deed, and left the agreement by which it was taken as a mortgage to rest only in secret confidence.

The only question remaining is, whether he is accountable for the commissions, as unlawful interest, which he received on the exchange of notes. There is no doubt that this Court will order a defendant to account for moneys overpaid in pursuance of a usurious contract. This was done in the case of *Bosanquet v. Dashwood*. (*Cas. temp. Talbot*, 37.) It is equally settled, that the defendant cannot avail himself of the time limited in the statute of usury, which defence his counsel suggested at the hearing; for the statute of limitations must either be pleaded or insisted on by the answer, to entitle the party to the benefit of it, though the Court will often, in cases of stale demands, take the time in the statute as a guide to its discretion. (*Prince v. Heylin*, 1 *Atk.* 493.)

Let us then see what is the charge, and what is the proof of usury, in this case.

\*The bill charges, that between the 27th of *January*, 1810, and the date of the assignment to the plaintiff in *May*, 1812, the *Wards* had various dealings with the defendant by exchanging notes, the defendant giving to the *Wards* his notes for different sums at different periods, and, at the same time, receiving from the *Wards* their notes payable at the same or other periods, upon which transactions, under the name of commissions, the defendant extorted usury to 2,000 dollars and upwards, over and above lawful interest. In answer to this charge, the defendant says, that between that period the *Wards* had various dealings with him, by way of exchanging notes; but he denies that he "extorted any sum above lawful interest under the name of commissions," though he admits he received, by

1816.

DEY  
V.  
DUNHAM.

A defendant will be ordered to account for moneys overpaid in pursuance of a usurious contract.

The limitation of the statute against usury must be pleaded or insisted on in the answer, otherwise the party cannot have the benefit of it, at the hearing.

[ \* 192 ]

1816.

DAY  
v.  
DUNHAM.

agreement, and in the course of trade, of the *Wards*, commissions from a half, to two and a half per cent., and which were received, not as usury, but as a legal mercantile compensation.

The testimony of *M. Ward* was competent proof. By his release he had discharged himself of all interest in the cause. He certainly does not come within the case of *Winton v. Saidler*, (3 *Johns. Cas.* 185.) in which it was held, that a person is not a competent witness to impeach the validity of negotiable paper which he had signed. The validity of the notes is not now the question. They are not before the Court. They have been discharged, and the testimony only incidentally affects their posthumous reputation. In the case cited, and in that of *Walton v. Shelly*, the suit was directly on the note, and the witness was offered to impeach it, and defeat the recovery.

*Ward* proves, that in the exchange of notes in *January*, 1810, there was paid to the defendant, by agreement between him and the *Wards*, a commission of, at least, 250 dollars, for such exchange. That when the exchange of notes was repeated, in *July*, 1810, the witness paid, in behalf of the *Wards*, and the defendant received, 250 dollars, \*at the least, as a commission for the exchange and renewal; and that the business of exchanging notes, upon the old notes falling due, continued for some time, and on every such occasion a commission was paid to the defendant; and that the amount of the commissions paid on the various exchanges and renewals of the notes, until the failure of the *Wards*, and the assignment to the plaintiff, was 1,200 dollars; but for all exchanges and renewals of notes, other than those above mentioned within the said period, the commissions paid thereon by the *Wards*, to the defendant, amounted to upwards of 7,000 dollars, all of which was paid for the loan of notes, and not for loans of money.

The testimony of *Edgar*, the defendant's witness, proves equally the receipt of the same commission on the exchange and renewal of the notes. But did the demand and receipt of the commissions amount to usury? The defendant gave his notes for a given sum, say 10,000 dollars, payable in six months, and took the notes of the *Wards* for the same sum, payable at the same time, and this operation was frequently repeated. This was not a cash advance. It was lending his credit or security to the *Wards*. They were enabled to raise money by discount on the notes of the defendant, as being of better credit in the market than their own; and if the defendant had not taken any commission for the transaction, he would have had nothing for his risk and trouble. If he had taken more than at the rate of seven

A commission  
of 21-2 per cent.  
taken on the re-  
newal of notes

[ \* 193 ]  
advanced to an-  
other in ex-  
change for his  
notes, for same  
sums, at or near  
the same peri-  
ods of time is  
not usury.

But if lawful  
interest be taken  
for the notes,  
for the time, and  
the commission  
is exacted, in  
addition, it will  
be usury.

per cent. for the amount of his notes for the time they had to run, it would, probably, have been usury in disguise. It would then have come within the reach of the cases of *Kent v. Lowen*, (1 *Camp. N. P. Rep.* 177.) and of *Dunham v. Dey*, (13 *Johas. Rep.* 40.) But the two and a half per cent., in this case, was less than at the rate of lawful interest. It was but 5 per cent., and it appears to me to have been a lawful compensation for the loan of his risk and credit. If the defendant had taken lawful interest upon his notes, as for so much cash advanced, and \*had then exacted the additional commission, I should have had no doubt of the usury. It is said to be settled, in *England*, that a country banker may take a reasonable commission for discounting, though it be for a person resident in *London*, and paid through a banker there, unless the bills were sent into the country as a mere color and device. The ground of the allowance is the expense of remitting checks, establishing a credit with bankers in *London*, keeping an unproductive balance there, and keeping a clerk. (*Jones ex parte*, 17 *Vesey*, 332.)

I shall, therefore, decree, that the defendant deliver up the deed of the 27th of *January*, 1810, and release to the plaintiff his right and title to the lots in question, with proper and apt covenants, to be settled by a master, against his own acts, and that he pay the costs of this suit.

1816.

DEY  
v.  
DUNHAM.

[ \* 194 ]

Some questions arose on settling the form of the decree in this case. October 11th.

It was admitted, that recitals in the decree must not be argumentative, but should only state the propositions or conclusions of law and fact, which are necessary to show the reason and meaning of the decree; (see a precedent for this purpose in the decree, in 2 *Sch. & Lef.* 455.) though Lord *Alvanley* said, in 7 *Vesey*, 373, that it was very uncommon to express in the decree the reasons for it. It was further observed, that if a deed be set aside as only constructively fraudulent, it is usual and proper to direct a release of the right of the party under the deed so set aside, with covenants against his own acts; and the chancellor directed the decree to be so drawn in this case. But in *Bates v. Graves*, (2 *Vesey, jun.* 294.) Lord *Rosslyn* thought a reconveyance altogether unnecessary, where the deed was declared absolutely null for fraud; and yet, it was there said to be the practice to direct a reconveyance, *ex abundanti cautela*, for the sake of purchasers. It was, however, not done in this case. Form of decree

\*The following decree was entered in the cause:—

“It satisfactorily appearing to the Court, that the deed of conveyance, mentioned in the pleadings in this cause from  
155

[ \* 195 ]  
Decree.



1816.

DEY  
v.  
DUNHAM.

*Matthias Ward*, also in the pleadings mentioned, to the defendant *David Dunham*, bearing date the twenty-seventh day of *January*, in the year of our Lord one thousand eight hundred and ten, for fifty lots of ground, situate, lying, and being in the ninth ward of the city of *New-York*, though an absolute and unconditional deed upon the face thereof, was intended by the parties only as a security, in the nature of a mortgage of the said premises to *David Dunham*; and it also satisfactorily appearing to this Court, from the pleadings and proofs therein, that the said deed of conveyance of the twenty-seventh day of *January*, in the year of our Lord one thousand eight hundred and ten, from *Matthias Ward* to the defendant, was never registered, nor recorded as a mortgage, and that the instrument in writing, in the pleadings mentioned, of the twenty-seventh of *July*, in the year one thousand eight hundred and ten, whereby the said deed of conveyance of the twenty-seventh day of *January*, in the year one thousand eight hundred and ten, appears to have been intended only as a security in the nature of a mortgage, was never registered nor recorded with the said deed, or otherwise, according to the directions of the act of the legislature of this state, in such case made and provided; and it also appearing to the Court, that the defendant omitted to register or record the said deed of conveyance, and instrument in writing operating as a defeasance thereof; and it also satisfactorily appearing to this Court, that *Matthias Ward*, afterwards, in form of law, conveyed and assigned the same premises to the complainant, by deeds of conveyance, the one bearing date the eleventh day of *May*, in the year of our Lord one thousand eight hundred and twelve, and the other bearing date the sixteenth day of *November*, in the same year, in trust for the payment of the debts of *Matthias \*Ward*, and one *William Ward*, his co-partner in trade and business, justly due to their creditors; and it also satisfactorily appearing to this Court, that the defendant *David Dunham* has sold and conveyed away two of the said lots of ground, contained in the said deed of conveyance from *Matthias Ward* to him, before mentioned, and received the consideration money for the same from the purchasers: It is therefore ordered, adjudged, and decreed, and his honor the chancellor, by virtue of the power and authority of this Court, doth accordingly order, adjudge, and decree, that the defendant *David Dunham* forthwith deliver up to the complainant *Anthony Dey*, the said deed of conveyance from *Matthias Ward* to the defendant, in the pleadings mentioned, bearing date the twenty-seventh day of *January*, in the year one thousand eight hundred and ten, to be cancelled; and that the defendant also, by a competent deed of conveyance

[ \* 196 ]

for that purpose, release and convey all his right, title, and interest of, in and to the premises in the last mentioned deed specified, and thereby conveyed to the defendant by *Matthias Ward*, (excepting the two lots, parcels thereof, afterwards sold and conveyed by the defendant as aforesaid,) to the complainant in this cause in fee; and that the said deed of conveyance from the defendant to the complainant hereby directed, shall contain proper and apt covenants from the defendant, against his own acts and transactions subsequent to the eleventh of *May*, one thousand eight hundred and twelve, whereby the title to the said premises may be impaired, or the said premises encumbered; the said deed and covenants to be settled by a master, if the parties cannot agree respecting the same. And it is further ordered, adjudged, and decreed, that the defendant pay to the complainant the costs of this suit, to be taxed, and that the complainant have execution for the same, according to law, and the course of this Court."

1816.

DEY  
V.  
DUNHAM

1816.

VAN VECHTEN  
v.  
TERRY.

\*VAN VECHTEN and SEBRING *against* TERRY and others.

Where real estate had been purchased by a joint fund, raised by subscription, of above 250 shares, or subscribers, and the property was conveyed to A., B., and C., as trustees; on a bill for the sale of the premises under a mortgage, made to the plaintiffs by the trustees, it is not necessary that the subscribers or stockholders should be made parties; the trustees sufficiently representing all the interests concerned, for that purpose.

September 31st.

THE bill in this case was filed for the sale of mortgaged premises, mortgaged to the plaintiffs by the defendants, as trustees, in pursuance of a trust contained in the deed to the defendants, for lands in the city of *New-York*, commonly known by the name of the *Washington Hall*, purchased by a joint fund, raised by a subscription in shares, by above 250 subscribers. The title to the property was never in the subscribers. There was a demurrer to the bill for the want of parties, inasmuch as the subscribers, or stockholders, were not made parties.

*Boyd*, for the plaintiffs.

*S. Jones, jun.*, for the defendants.

THE CHANCELLOR. The trustees were selected in this case to hold and represent the property, for the sake of convenience, and because the subscribers were too numerous to hold and manage the property as a copartnership. The trustees are sufficient for the purpose of this bill, which is for a sale of the pledge; it would be intolerably oppressive and burdensome, to compel the plaintiffs to bring in all the *cestui que trusts*. The delay, and the expense incident to such a proceeding, would be a reflection on the justice of the Court. This is one of those \*cases in which the general rule cannot, and need not be enforced; for the trustees sufficiently represent all the interests concerned; they were selected by the association for that purpose, and we need not look beyond them.

[ \* 198 ]

Demurrer overruled

1816.

PEOPLE  
V.  
GOODHUE.

PEOPLE *against* GOODHUE.

Under the *habeas corpus* act, the chancellor will not discharge a prisoner who had been committed by a justice of the peace, under the act for apprehending and punishing *disorderly persons*, the warrant of commitment stating that the prisoner had been duly convicted, &c., and the conviction being, *prima facie*, legal and regular.

*Quare*; Whether this Court, independently of the statute, has any common law jurisdiction in such case?

THE defendant was brought up on *habeas corpus*, allowed by the chancellor under the *habeas corpus* act; and the return stated, that he was detained in custody by virtue of the following warrants of commitments, viz.

October 8th and  
14th.

A *mittimus*, issued by J. Hedden, one of the justices of the city of New-York, on the 17th of August last, for that the prisoner was charged with a misdemeanor, alleged to have been committed within the state of Kentucky, in procuring money by false pretences.

2. A like *mittimus*, issued by J. Warner, one of the justices, &c., on the 21st of August last, for a like offence, committed in Kentucky.

3. A *mittimus*, issued by J. Hedden, one of the justices, &c., stating that the defendant had been convicted before him, as a disorderly person, and that he thereupon committed him to prison, for sixty days.

\*T. A. Emmet, and Price, moved that the prisoner be discharged; and read an affidavit of the prisoner, stating, among other things, that the conviction had been removed into the Supreme Court by *certiorari*, and a recognizance duly entered into, to prosecute the same, &c., as is required by the statute in such cases.

[ \* 199 ]

Rodman, (district-attorney,) contra.

THE CHANCELLOR. It will be unnecessary to take notice of the two first warrants of commitment, because the commitment upon the conviction as a disorderly person is sufficient to detain the prisoner. The act of the 9th of February, 1788, entitled "an act for apprehending and punishing disorderly persons," declares what description of persons shall be deemed disorderly persons within the purview of that act, and, among others, that "all idle persons, not having visible means of livelihood," shall be so deemed and adjudged. The act further declares, that it shall be lawful for any jus-

1816.

PEOPLE  
v.  
GOODHUE.

[\* 200]

tice of the peace to commit such disorderly persons, on conviction thereof, by his own view, or by confession or proof. for any time not exceeding sixty days. Such a conviction was stated in the warrant itself, and the prisoner is, therefore, in the language of the *habeas corpus* act, "a person convict, or in execution by legal process." It is not for me to examine into the legality or regularity of the conviction, any further than to see that the magistrate had competent jurisdiction to convict and imprison in the given case. This Court has no general appellate or criminal jurisdiction. It belongs to the Supreme Court to review the errors (if any there be) in the conviction in this case, and the proceeding has already been removed into that Court. I am only to exercise the power given me by the *habeas corpus* act; and without that statute, I should have hesitated greatly before I ventured to assume any common law jurisdiction over \*the subject matter. The conviction and imprisonment in this case, are, *prima facie*, good and valid in law, and that is sufficient upon this collateral inquiry. They must be held valid, until quashed or reversed in the regular course of appeal, by the appropriate tribunal.

Nor does the suing out the *certiorari*, or giving the recognizance, affect the conviction or the imprisonment. A *certiorari* is no *supersedeas* to an execution already executed; and if the prisoner cannot have the effect of his writ until after the sixty days have expired, it is owing to the provisions of the law, which this Court cannot control. The prisoner must accordingly be remanded.

October 14th.

The term of imprisonment having expired, the prisoner, this day, sued out a new *habeas corpus*, and was brought up, and the return stated that he was detained only under the two first warrants, above mentioned.

THE CHANCELLOR observed, that a reasonable time had been allowed to the party complaining, to procure from the executive of *Kentucky* a demand of the prisoner, as a fugitive from justice, for the misdemeanor alleged to have been committed in that state; and as no such demand appeared, he ought not to be detained any longer. It would be idle to take a recognizance of the prisoner to appear in any Court in this state, as no such Court can take cognizance of the offence charged; and the Court has no authority to require a recognizance to appear before a foreign jurisdiction.

Prisoner discharged.

1816.

DEAN  
V.  
CODDINGTON.

\*DEAN *against* CODDINGTON and others.

Where there is an order of reference to a master to ascertain the amount due on a mortgage, on the coming in of his report, the cause must be set down for hearing on the requisite notice ; a decree of sale entered immediately on filing the report, was set aside for irregularity.

BILL to foreclose mortgages, and for specific relief against *Coddington*, one of the defendants. The bill was taken *pro confesso* against all the defendants but C., who answered, and issue being joined, the rules to produce witnesses, and to pass publication, were regularly entered. The cause was set down for hearing in *June*, 1816, and duly noticed ; the defendant C. made default, and an order of reference was obtained, to ascertain the amount of the mortgages, but no other decretal order was entered. The defendant C., though duly summoned, did not appear before the master, and a report was made on the 22d of *June* last, (being the last day of the Court,) and confirmed, and a decree entered for the sale of the mortgaged premises ; and that the defendant C. bring certain deeds in his possession into Court, and pay costs.

October 10th.

*Burr*, for the defendant C., now applied to the Court, by petition and notice, to set aside the decree for irregularity, inasmuch as the cause was not regularly set down for hearing, on the requisite notice, upon the coming in of the master's report, and upon the equity reserved, in respect to the defendant C.

*T. A. Emmet*, contra.

THE CHANCELLOR considered the objection to the regularity of the decree, as against the defendant *Coddington*, \*well taken, and the same was accordingly set aside, so far as it related to him.

[ \* 202 ]

1816.

ROBERTS  
v.  
ANDERSON.

ROBERTS and BOYD *against* B. and J. ANDERSON.

Affidavits *ex parte* are not allowed to be read in support of an answer, on a motion to dissolve an injunction.

Where the bill on which an injunction was issued to stay proceedings at law, in an ejectment suit, charges the deeds on which the defendant set up his title at law to be fraudulent, the injunction will not be dissolved on the coming in of the answer, unless it be full and satisfactory as to the fraud, but will be continued until the hearing. Stating that the defendants were not privy to any fraud, and were *bona fide* purchasers, that they believe the title was good, and that they do know or believe the deeds under which they derived their title were fraudulent, is not sufficient.

The granting and continuing of injunctions rests in the discretion of the Court, to be governed by the nature and circumstances of the case.

October 11th.

THE bill stated, among other things, that the plaintiff *Roberts*, on the 22d of March, 1810, took an assignment from *Aaron Lyon*, of a bond and mortgage of *William Griffith*, for part of a lot, and a house thereon, in *Newburgh*, for which he paid *Lyon* the balance due on the mortgage: that the plaintiff *Roberts* took possession of the mortgaged premises, and also of the residue of the lot belonging to *Griffith*, who was his debtor, and absconded. That the plaintiff leased the premises to *Hector M' Cleod*, for a year from the 1st of May, 1810. That on the 5th of October, 1810, the premises were sold by the sheriff, under an execution on a judgment against *Griffith*, in favor of *B. Taylor*, docketed the 14th of May, 1808; and the plaintiff *Boyd* became the purchaser, at the request of *Roberts*, and in trust for him, and received a deed from the sheriff. That *Griffith* had, previously, to wit, on the 20th of January, 1808, conveyed part of the premises, being that mortgaged, \*for the pretended consideration of 2,000 dollars, to *Sarah Johnson*, and had also conveyed to her the other part, for a pretended consideration of 1,500 dollars, but which conveyances, the plaintiffs alleged, were made for a mere nominal consideration, with a view to defraud the creditors of *Griffith*, to whom *Sarah Johnson* afterwards reconveyed the property, and before the judgment and execution of *Isaac Clason* against her. That the defendants, claiming right to the lot under a deed, dated the 1st of June, 1810, from the sheriff, under an execution against *Sarah Johnson*, at the suit of *Clason*, brought an action of ejectment against *M' Cleod*, who entered into the consent rule, and a verdict passed against him in favor of the defendants, on which a judgment was entered in May, 1815. That the recover-

[ \* 203 ]

was had on the production of the sheriff's deed, and proving that *M<sup>c</sup> Cleod* had, in *May*, 1810, agreed to take a lease from the defendants, whereby the relation of landlord and tenant was supposed to exist between them, and the judge refused evidence of his being a tenant of *Roberts*. The bill prayed an injunction, staying all proceedings on the judgment in ejectment, which had been granted.

The defendants, in their answer, denied any *knowledge* or *belief* that the deeds of *Griffith* to *Sarah Johnson* were executed with any fraudulent intent; and stated, that they did not know or believe that the considerations were merely nominal, or that *Griffith* was insolvent, &c., but averred that the considerations expressed were actually paid, or were debts due by *Griffith* to *S. J.* The defendants also referred to a deposition of *Sarah Johnson*, taken in *perpetuam rei memoriam*, of the contents of which they averred their belief; and also to a deposition of *Thomas Allen*, taken *de bene esse*, and who was since dead.

1816.

ROBERTS  
V.  
ANDERSON

*Burr*, for the defendants, now moved to dissolve the injunction, which had been allowed by the master, on the \*facts stated in the answer. He also moved for leave to read the two depositions referred to in the answer.

[ \* 204 ]

*S. Jones, jun.*, and *Boyd*, contra.

THE CHANCELLOR. The affidavits are not allowed to be read in support of the answer on this motion. (*Eastburn & Downes v. Kirk*, 1 *Johns. Ch. Rep.* 444.)

Both parties deduce title to the premises in controversy from *William Griffith*, and the only point is, whether the two deeds from *Griffith* to *Sarah Johnson*, under whom the defendants set up title, were fraudulent and void. This question of fraud was not tried; and from the history of the ejectment suit, as stated in the pleadings, it would seem that it could not be tried, as the recovery was placed entirely on the ground that the defendant at law was tenant to the new defendants, and so concluded from setting up this defence. But the fraud, as charged, is a proper and familiar head of equity jurisdiction, and unless the answer be full and satisfactory, the injunction, if right in the first instance, ought to be retained until the hearing. The injunction was issued after the verdict at law, to restrain the defendants from proceeding to execution; and it was certainly a proper restraint until the question of fraud was disposed of, for on that depended the question of title between these parties. All the denial contained in the answer is, that the defendants were not privy to any fraud,



1816.

ROBERTS  
v.  
ANDERSON.

[ \* 205 ]

and were *bona fide* purchasers, under a judgment and execution against *Sarah Johnson*. If she had no title, they had none; and they aver that they believe her title was good, because they do not know or believe that the conveyances from *Griffith* to her were fraudulent. This is leaving the question of fraud as unsettled as before the answer came in. It is true, the defendants may have given all the denial in their power, but the fraud may exist notwithstanding, and consistently with their ignorance, or the sincerity of their belief. It appears to me, then, that until the cause is brought to a hearing, and decided on the merits, the possession ought not to be changed, and that the case does not fall within the reason of the general rule, that an injunction is to be dissolved when an answer comes in and denies all the equity of the bill. In some particular cases, the Court will continue an injunction, though the defendant has fully answered the equity set up. (*Wyatt's P. R.* 236. 2 *Ves.* 19.) The granting and continuing of the process must always rest in sound discretion, to be governed by the nature of the case.

Motion denied.

1816.

HOWARD  
v.  
MOFFATT.

**BENNETT against WINTER and RANKINS.**

A final decree, regularly obtained and enrolled, cannot be opened or altered, but on a bill of review ; and, if not enrolled, it can be corrected only on a rehearing, duly applied for according to the rules of the Court.

**WELLS**, for the plaintiff, presented a petition, sworn to, and accompanied with due notice of the application, to have the final decree, which was entered in this cause on the 14th of *July*, 1815, corrected, by adding to it supplementary provisions.

October 12th.

*Winter*, in *pro. perso.*, contra.

**THE CHANCELLOR.** A final decree, regularly obtained and enrolled, cannot be opened or altered, in this Court, \*but upon a bill of review, and, if not enrolled, it can only be corrected upon a rehearing, duly applied for under the rules of the Court.

[ \* 206 ]

Motion denied, with costs.

**T. HOWARD, and MARIA his wife, against MOFFATT.**

Where a husband asks the aid of the Court, to enable him to get possession of his wife's property, he must do what is equitable, by making a reasonable provision out of it, for the maintenance of her and her children. And whether the husband applies himself, or a suit for the wife's debt, legacy, portion, &c. is brought by the legal representatives of the husband, the rule is the same. The extent of that provision will depend on the circumstances of the case. But if the husband can lay hold of the property of the wife, without the aid of the Court, he may do it, this Court not having power to enforce a settlement, by interfering with his remedies at law.

**THE** bill stated, that the father of the plaintiff's wife died intestate, leaving five children, and a large real and personal estate ; that part of the real estate, by the consent of the plaintiff, and the proceeds of what had been sold, are in the hands of the defendant, who refused to account,

October 17th.

1816.

HOWARD  
V.  
MOFFATT.

&c. The bill prayed that the defendant might account, and pay over the money to the plaintiff.

The defendant, (who is the brother of the plaintiff's wife,) in his answer, admitted the death of the ancestor, and the estate, &c., and stated the personal estate had been duly distributed; that most of the real estate had been sold; that he had in his hands moneys belonging to the wife of the plaintiff, amounting to 1,290 dollars and 90 cents; and that she had frequently requested him not to pay it over to her husband.

[\* 207]

The master's report stated, that there were 1,923 dollars \*and 77 cents due from the defendant; that it was proved before him, that the plaintiff was, by profession, a mariner, and poor; and that the defendant was a person of property, and a prudent man; that the wife of the plaintiff was examined, by consent, and stated, that she had always lived harmoniously with her husband, who was captured, some years ago, by a *French* privateer, and remained in *Europe* for five years, and was absent from *New-York* seven years: that when he went abroad he left money sufficient to maintain her during the time he expected to be absent; but the sum, and the credit he had given her, were soon exhausted, and she was obliged to sell the plaintiff's furniture for her maintenance; that before, and since the period of his absence, she had been exclusively maintained by him; and during his absence he had corresponded with her by every opportunity. That, as the plaintiff was now out of business, and might prove unfortunate, she wished the defendant to keep her money, as it would be safer with him; and that she was, at present, maintained by the plaintiff.

The cause was now brought on for a final hearing.

*D. B. Ogden*, for the plaintiff, moved that the report of the master be confirmed, and that the defendant be decreed to pay over the money in his hands to the plaintiff. He stated that the real estate of the wife, still unsold, was worth 2,000 dollars, and was adequate to her support.

*Riker*, contra, insisted, that the money should remain in the hands of the defendant, on his giving good security, for the use of the wife and child. He cited 1 *Madd. Ch.* 384. 391. 3 *Vesey*, 168.

[\* 208]

THE CHANCELLOR. The general rule is, that where the aid of the Court is requisite to enable the husband to take possession of the wife's property, he must do what is equitable, by making a reasonable provision out of it for \*her maintenance and that of *her children*, and without that,

the aid of the Court will not be afforded him. The practice is, for the husband, on a reference, to make proposals of a settlement before a master, and, on the coming in of his report, the Court judges of its sufficiency. Whether the husband applies by himself, or a suit for the wife's debt, legacy, portion, &c., be brought by the legal representatives of the husband, as his executors, or assignees, the result is the same, and the aid of the Court will not be afforded without a suitable settlement, unless, perhaps, the wife comes into Court, and on examination voluntarily waives any provision. It seems now to be understood, (Sir *Wm. Grant*, in *Murray v. Elibank*, 13 *Vesey*, 1.) that the wife may, at her option, waive any settlement, though in one case, Lord *Hardwicke* still sternly insisted on a provision for her, (*ex parte Highham*, 2 *Ves.* 579.) if indeed we may rely on a loose authority, and which was directly contrary to a prior and strong case in his time on that point. (*Willats v. Cay*, 2 *Atk.* 67.) The extent of the provision will depend upon the circumstances of each case. If the husband can lay hold of the property without the aid of a Court of equity, it is understood that he may do it; the Court has not the means of enforcing a settlement by interfering with his remedies at law. These are the general rules which have been established by a course of practice under this peculiar doctrine of the Court, and which has been steadily and uniformly observed, for above a century past. Lord keeper *Wright*, in *Oxenden v. Oxenden*, 2 *Vern.* 494. *Bosvil v. Brander*, 1 *P. Wms.* 459. *Jacobson v. Williams*, 2 *P. Wms.* 382. *Brown v. Elton*, 3 *P. Wms.* 202. *Jewson v. Moulson*, 2 *Atk.* 417. *Grey v. Kentish*, 1 *Atk.* 280. *Burdon v. Dean*, and *Oswell v. Robert*, 2 *Ves. jun.* 607. 680. *Brown v. Clarke*, 3 *Vesey*, 166. *Lump v. Milnes*, 5 *Vesey*, 517. *Vide* also 1 *Vesey*, 539. 1 *Ves. & Beame*, 300. and *Murray v. Elibank*, 13 *Ves.* 1.)

\*In the case before me, there are sufficient reasons for requiring some provision for the wife out of the fund in question. Though there be real property of the wife still undisposed of, yet the husband has a life estate in it, and her residuary interest would not be very productive. The fact has also occurred, that she has been left for years unsupported by her husband, in consequence of his unavoidable absence; and it appears from the master's report, that his means of living are small, and the exercise of his maritime profession unusually hazardous. Under these circumstances, provision ought to be made for the wife out of the moneys now due to her from her father's estate, before the husband can receive the aid of the Court.

I shall, therefore, suspend the decree, and recommend, in

1816.

HOWARD  
v.  
MOFFATT.

[ \* 209 ]

1816.

STOUGHTON  
v.  
LYNCH.

the mean time, that the amount of 1,000 dollars be secured for the wife and child, by an amicable arrangement between the parties, and that the residue be paid over to the husband. If this recommendation be not effective, I will then make some direction in the case.

N. B. The arrangement recommended took place, and the cause was not brought again before the Court.

---

STOUGHTON *against* LYNCH.

A partner who draws out money from co-partnership funds is not chargeable with compound interest, but with simple interest only, on the sums drawn out; unless it appears that he has traded or speculated with the money, and made a profit on it, and refused, on being called on for the purpose, to disclose the profits.

The correct and legal mode of computing interest, on an account between debtor and creditor, where partial payments are made, is first to carry the payment to the extinguishment of the interest due, and if such payment exceeds the interest due at the time, then to deduct the surplus only from the principal, and compute interest on the balance to the next payment.

[ \* 210 ]

\*Whether the practice prevailing among merchants in settling their accounts, to state an *interest account*, in which interest is charged on each *item* of principal on the *debit* side, and credited on each *item* on the *credit* side of the account, and a balance of such interest account struck, and added to the balance of principal, is to be adopted in the settlement of accounts between merchant and merchant? *Quære*.

But where a master, under an order of reference to him, in stating an account between the parties, who were partners in trade, adopted this mercantile usage, the account was allowed to stand, there being evidence before the master that from the books of account, and otherwise, the parties themselves had followed this usage, and the calculation was so made by an eminent merchant to whom the accounts were referred, with the consent of the parties, who did not question the statement when it was brought in to the master.

In stating an account between partners, the true dates, as furnished by the books of account themselves, ought to be assumed.

A party cannot surcharge and falsify an account, unless upon the ground of mistake or error distinctly charged.

The period of the dissolution of partnership is the proper time to make a rest, and adjust the balance of the partnership account; and the partner against whom the balance is found, is chargeable with interest thereon.

A *recital* in a deed, founded in mistake, and untrue in fact, will not be allowed to operate, by way of *estoppel*, to exclude the truth satisfactorily shown to the Court.

October 24th.

THE bill, which was filed the 12th of *July*, 1805, was for an account between the parties, who were partners in trade

The defendant put in an answer in *June*, 1807, which was excepted to, and an amended answer filed in *October*, 1807. The plaintiff having filed a replication, witnesses were examined, exhibits proved, and publication being passed, the cause was brought to a hearing in *June*, 1814. On the 6th of *July*, 1814, a decretal order was entered, for a reference to a master to take and state an account between the parties; and he was directed that the defendant should be charged with interest on all sums drawn out of the copartnership funds by him, beyond the amount necessary for his private expenses; and to report what was the reasonable rent for a store and lot of ground mentioned in the pleadings, since the bill was filed, and for what time the same had been occupied by the plaintiff, since issue was joined in the cause; and all further directions were reserved, until the coming in of the report. The parties were examined on interrogatories, respectively, \*before a master; and the books of account were, by the consent of the parties, delivered to Mr. *Samuel Corp*, a respectable merchant, for the purpose of stating their respective accounts. After various hearings before the master, exceptions and orders, the cause was brought on to a hearing on the 1st of *July*, 1815, on the coming in of the master's report, to which the parties made various exceptions; and, on the 8th of *July*, 1815, a decretal order was made overruling all the exceptions to the report, with the qualification, that the master, in taking an account of the sums drawn out, or received by the defendant from the copartnership funds, beyond the amount necessary for his private expenses, be directed to deduct from the amount of the sums so drawn or received in each year, such sum, not exceeding the whole amount so drawn or received each year, as, under all the circumstances, should appear to be a reasonable allowance for the expenses of the defendant's family during each year, including therein a reasonable sum for the education of his children, and excluding any allowance for house rent, during the time the defendant occupied a house of his own, referred to in the accounts, further than it should be proved that the funds of the partnership were withdrawn by the defendant to pay interest on the cost of the house; and that the defendant pay the costs of the special report and subsequent proceedings thereon. (See vol. 1. p. 467—472. S. C.)

1816.

STOUGHTON  
V.  
LYNCH.

[ \* 211 ]

The cause being again before the master, witnesses were further examined, and the parties heard before him: he made a report, dated the 13th of *May*, 1816, which was filed on the 3d of *June* last, with the schedules of the various accounts and statements annexed. By this report, the master made a balance due to the plaintiff from the defendant, on

1816.  
  
 STOUTENTON  
 V.  
 LYNCH.  
 [ \* 212 ]

the 13th of *May*, including interest, of 22,216 dollars and 20 cents. Mr. *Corp*, in making up the account of sums of money drawn by the defendant out of the copartnership funds, beyond the amount of his capital, had charged *compound interest* on the sums, from *February*, 1788, \*until *July*, 1795, when the partnership was dissolved; but this being objected to before the master, he altered the account so as to charge simple interest only. Both parties filed *exceptions* to the master's reports; and on the 21st of *September*, an order, by consent, was entered, allowing either party to file *further exceptions*, which were accordingly filed, and the cause was set down for a hearing on the *exceptions and further exceptions* of both parties to the report. All the exhibits which had been directed to be filed with the assistant register, together with the partnership books of account, were brought before the Court.

It is unnecessary to state the pleadings and proofs in the cause, which were voluminous, nor the report or exceptions, as the material facts are sufficiently stated by the chancellor, in noticing the several points which were discussed before him.

The cause was argued by

*Harison*, and *Wells*, for the plaintiff.

*T. A. Emmet*, and *Riggs*, for the defendant.

*October 24th.*

The argument occupied five days, from the 1st to the 6th of *October*; and the cause having stood over for consideration until this day, the following opinion was delivered by the Court:

[ \* 213 ] THE CHANCELLOR. This cause comes on upon exceptions taken, by each party, to the master's report. The first exception on the part of the plaintiff is, that the master, in charging interest upon the moneys drawn or received by the defendant from the copartnership funds, beyond the amount necessary for his private expenses, has charged simple interest only, between the 15th of *February*, 1788, and the 3d of *July*, 1795, whereas interest ought to have been added to the principal at the end of each year, and \*interest computed upon the aggregate amount. The decretal order of the 6th of *July*, 1814, directing the account to be taken between the parties, specially declared that each of the parties be charged with the sums respectively drawn or received from the copartnership funds, and that the defendant be, moreover, charged with interest upon all such sums of money as  
 170

may have been drawn or received by him beyond the amount necessary for his private expenses. It was certainly not within the contemplation of the Court, when that order was made, that compound interest was to be charged against the defendant. Before such charge was to be made, he should have been called on to account for the profits of the moneys he had overdrawn; as, if he had not disclosed the profits, then a recourse could have been had to compound interest as a substitute for the profits which he might reasonably be supposed to have made. But, under the circumstances of this case, there was not sufficient reason appearing to the Court for the presumption of extraordinary gain made by the moneys, or for imputing to the defendant any very gross violation of the contract between the parties. The defendant had not traded on the moneys overdrawn, and it was believed that his land speculations did not yield a profit requiring such an exaction, even if the moneys withdrawn had been applied to that object. And the plaintiff himself was, in some degree, remiss in not causing a balance of the books to be annually made, and the amount of the sums withdrawn annually placed under the view of the parties. The exception, therefore, must be overruled.

The third exception is, that the master, in stating the accounts between the 15th of *February*, 1788, and the third of *July*, 1795, has not, as he ought to have done, in passing moneys, from time to time, to the credit of the defendant, first deducted the interest due from the defendant to the copartnership, and if such credit exceeded the interest due, the surplus only of such credit should have been deducted \*from the principal, and interest computed only on the balance. This exception goes to the whole mercantile usage of computing interest on merchants' accounts. The correct mode of crediting payments, as between debtor and creditor, is to carry them, in the first place, to the extinguishment of the interest due, according to the principle of this third exception; and it is susceptible of mathematical demonstration, that if credits be not so applied, but the principal of the debt is left to continue upon interest, and interest is computed upon the payments as they are successively made, a debt will, in the course of a few years, (and the time will be longer or shorter according to the rate of interest,) be wholly extinguished by payments of interest, without paying a cent of principal. I have, however, always understood and observed, that the usage amongst merchants, in stating their accounts, is different, and conformable to the master's report. It is the debtor who gains, and the creditor who loses by this mode. But this usage is not very material when there are long mutual credits, because the rule operates equally upon the

1816.

STOUGHTON  
v.  
LYNN.

When compound interest is chargeable on moneys overdrawn by one partner from the partnership funds.

The true mode of computing interest on an account between debtor and creditor where partial payments are made.

[ \* 214 ]



1816.

STOUGHTON  
v.  
LYNCH.

As to the practice of merchants in stating interest accounts; *Quare.*

[\* 215]

credits of each party, and if the balances are nearly the same, the result is equal. I have often been surprised that the sagacity of merchants should not have perceived the inconvenience of their rule, as between them and their country customers, for, being generally creditors, the loss is theirs; but I apprehend that this is met and corrected by the custom of making short rests in their accounts, and computing interest on the balances that from time to time arise. Such rules will generally produce, in the course of time, their correspondent equivalent. In the present case, I have no doubt, the parties, throughout their accounts, have followed the mercantile usage, and as far as any partial calculation or settlements, in respect to each other, have been made, they would, of course, follow that custom. Shall I, then, break in upon that usage, in the settlement of these copartnership accounts? As the \*plaintiff claims to be, and is found to be, the creditor, he has an interest that I should do so; but I do not think, upon a consideration of this case, that I ought to disturb the complicated calculations attending the report upon this point. The master has not reported, nor has he been called upon to report, the evidence he may have had of the practice of the copartnership derived from their books, or from other circumstances. I have a right, therefore, to presume he had sufficient evidence of their practice to warrant the mode he has adopted. It is further to be observed, as a fact admitted upon the argument, that the accounts of the copartnership were, by mutual consent, referred to, and made up, by Mr. *Samuel Corp*, a respectable merchant, well known as an accurate accountant, and perfectly familiar with mercantile understanding and usage on this subject. I presume, that when the calculations came in, they were never questioned on this point, before the master, but were acquiesced in by both parties. There is nothing before me to contradict this natural and necessary inference, and I think the parties are properly concluded. Even without this inference, I am not prepared to say that the mercantile practice ought to be questioned on a settlement of accounts between merchants themselves. Their running accounts are kept, entries made, and balances, from time to time, adjusted, upon the fact of their own invariable usage as to their mode of keeping accounts. In *Clancarty v. Latouche*, (1 *Ball & Beatty*, 420.) Lord Chancellor *Manners* inferred, from the tacit acquiescence of the party, an agreement at the end of every year, in favor of yearly rests, by which interest was made principal. The usage was evidence that this was the mode of dealing intended. Without, however, laying down any rule for the government of the Court hereafter, on this

point, there is enough in this case to hold these parties to the mode of settlement which has been adopted.

The remaining exceptions, on the part of the plaintiff, are only an amplification, *in extenso*, of this third exception, \*that payments ought first to be applied to discharge the interest, and then to reduce the principal; and, consequently, they all rest upon the same principle, and admit of the same answer. All the exceptions taken on the part of the plaintiff are, therefore, overruled.

I proceed next to consider the exceptions taken on the part of the defendant.

The first exception is, that the master, in taking and stating the accounts, has deemed the capital, which the defendant was bound to furnish, to be 9,015*l.* 17*s.* 10*d.*, instead of 8,888*l.* 17*s.* 9*d.* In connection with this exception, and as a more full explanation of it, are the first and second *further* exceptions, in which it is objected that the master has deemed the sum of 208*l.* 17*s.* 9*d.*, with which the defendant is credited, on the second of *April*, 1785, (being the premiums on certain bills of exchange, drawn for a part of the defendant's capital,) to be a part of the defendant's capital, whereas it ought to have been deemed to have belonged to the defendant individually, and was no part of his capital.

The premiums of these bills of exchange properly belonged to the company in whose favor they were drawn. The rate of exchange, whether it be gain or loss, falls on the creditor; and yet, in this case, the gain is not credited to the company, but to the defendant, as part of his capital. This would apparently seem to be to the benefit of the defendant, and yet, I apprehend, it would have been more correct to have charged it, in the first instance, as the company's gain or profit; and whether it be so charged, or as it stands in the report, becomes material only as to the interest charged in stating the accounts. But I am inclined not to interfere and disturb the whole calculation on account of this *item*, because it appears to me that the defendant comes too late with the objection. This difference of exchange was credited in the books as early as the second of *April*, 1785, as part of the defendant's capital, \*and this application of these premiums has been acquiesced in to the date of the report; though, in 1795, the question of the amount of capital of each party came under distinct consideration, and the deficiency of the plaintiff's capital was liquidated and settled at a sum in gross. It is impossible not to believe that the defendant was well acquainted with the actual appropriation of these premiums to his capital, and he has acquiesced in the mode of the appropriation, during the lapse of thirty years. It has, therefore, received a valid ratification.

1816.

STOUGHTON  
V.  
LYNCH.  
[ \* 216 ]

[ \* 217 ]

1816.

STOUGHTON  
v.  
LYNCH.

A party cannot surcharge and falsify an account, unless on the ground of mistake or error, distinctly charged.

The second exception is, that the master, in eight different and specified cases, has charged the defendant with various sums of money, not at the times respectively at which the defendant is debited with them in the books of the firm, but at different times, and those long antecedent to the dates in the books. In respect to this exception, I admit the general rule, that you cannot surcharge and falsify an account, unless upon the ground of mistake or error, to be distinctly charged: but no such thing is attempted in this case. (See *Palmer v. Mure*, *Dickens*, 489. *Lord H. v. Vernon*, 4 *Vesey*, 411. and 1 *Maddock's Treat.* 82, 83.) The report is said to be supported in respect to the date of these charges, by the entries in the books, and the exception is resolved into an inquiry respecting the fact, and is to be determined by an inspection of the books.

The charges are all correct in point of date, or as to the time when the advance was made, or payment received. The books of the copartnership furnished, in every instance, the true date as charged. I have carefully perused the entries for the purpose, and have satisfied myself as to the fact. Though the entries were made at later periods, they refer back, in all these instances, to the time which has been taken. The exception goes only to the date of the charges, and fails in every instance. I presume, \*and cannot but deem it proper, that in stating accounts between copartners, the true dates, as furnished by the books themselves, ought to be assumed. A regard to truth and certainty, in all dealings, would naturally lead to the adoption of this rule; and I have greater confidence in the accuracy and propriety of this mode of stating the accounts, because I know it was done by the accountant to whom I have already alluded. It has been supposed, however, there is evidence that the parties intended that these charges should be considered and deemed to have arisen at the subsequent dates, when entries in respect to them were made; but I have not been able to perceive that the books furnished the requisite evidence of such intention. The most plausible inference of this kind arises from the entries in *September*, 1794, relative to the cargoes of the *Jenny* and *Anthony*; and yet, on examination, it will be found, that those entries and liquidations had no reference to a settlement or adjustment of accounts between the present parties, individually, as copartners, nor as to the question of interest *between them*. The entries referred to a settlement, as to those voyages between the firm and others, and between the firm and the defendant, but not between the plaintiff and the defendant, as the two parties composing the firm; and therefore the entries afford no inference applicable to the case.

[ \* 218 ]

It is further to be observed, that this exception has strictly nothing to do with the question of interest, but relates only to the true time at which these charges are to be dated, from which interest (if any) is to be computed. The question of interest arises incidentally only, under this exception; though if it were not for the question of interest, it would be perfectly immaterial what date was assumed for the charges. If I could perceive, from the books, any certain evidence that the parties had ever come to any settlement in respect to their claims against each other, either as it concerned the charges or the interest, I should be strongly disinclined to open or disturb it. Whenever a settlement, in respect to any precise charge or point, appears to have been made, I have uniformly felt disposed to respect it. But no settlement on the points now in discussion has taken place, and there is nothing to conclude either party: it is then perfectly just that interest, if it be computed at all, should be computed from the true time of the advance and payment. A subsequent entry of a charge, without mentioning interest, does not, of itself, conclude or estop a party from charging interest upon the final settlement of the accounts. This would be very unreasonable. It is no more a just ground of inference that the party had agreed to waive interest, than the entry of a charge for cash is a waiver of interest upon it, unless the entry then adds that the interest is charged. When the party comes to make out and exhibit his account, and demand payment, the demand of interest is to be made.

The sixth exception is, that the master, in stating the accounts, has made a rest on the 3d of *July*, 1795, and has allowed to the parties respectively interest from that period upon the balances then due.

The period here mentioned was the time of the dissolution of partnership, and that was, undoubtedly, the proper period to adjust the balance, and the party, who was then the debtor, became so, with obligation to pay, and is, therefore, justly chargeable with interest on such debt. It would seem to be very unreasonable, that the balance then truly due should be retained in his hands down to this day, free of all interest. I apprehend that this is the general practice, as well as the good sense of the thing, that a rest should be made on the liquidation and adjustment of accounts at the period of the final dissolution of the concern.

The eleventh exception is, that the master has reported that, from an examination of the allegations and proofs, he has ascertained that the plaintiff was not in possession of the store, mentioned in the pleadings, since the issue \*joined in the cause on the 11th of *May*, 1808, whereas he

1816.

STOUGHTON  
V.  
LYNN.

[ \*219 ]

The time of dissolution of the partnership is the proper period to adjust the balance between partners. Interest is chargeable on the balance then found.

[ \*220 ]

1816.

STOUGHTON  
V.  
LYNCH.

ought to have reported that the plaintiff was in possession jointly with the defendant.

The sixth further exception is only an amplification of this, viz. that the master did not find and report that the defendant executed a conveyance to the plaintiff of the moiety of the storehouse and lot. The report on this subject states, that it has not been found, on examination, that the defendant executed to the plaintiff a conveyance for an undivided moiety of the store and lot mentioned in the pleadings, or that the same was prepared or intended to be executed, or that the same was considered as executed, or that the parties have acted as though it was executed, otherwise than by executing, on the 25th of *January*, 1815, a deed of the same, in which there was a recital stating that a conveyance was executed by the defendant to the plaintiff of an undivided moiety of the said store and lot on the 1st of *February*, 1795. The report further states, that the deed was executed by the plaintiff without having been examined or read by him, and that an agreement between the plaintiff and the defendant, dated the 14th of *January*, 1815, was in evidence before him. The agreement above referred to, and signed by the plaintiff, recites, that the parties are seised in fee equally as tenants of the storehouse and lot; and *James Stoughton*, a witness for the plaintiff, states, on his examination, the circumstances under which the agreement was signed. He says, that an admission of the fact that such a deed from defendant to plaintiff was executed, had been drawn and signed by the plaintiff's counsel, without his knowledge or authority; and that the admission of the plaintiff to the same effect in the agreement above referred to, and founded on the admission of counsel, was obtained from him by his counsel, without any explanation, and under his ignorance of such an admission contained in the agreement. The witness further states, that the deed of the plaintiff \*to *John Sudam*, of the 25th of *January*, 1815, was executed by the plaintiff without reading it, and was not in his possession except at the time of execution. In addition to this testimony, the defendant, in his answer to the bill, states, that some time after the dissolution of the copartnership, he proposed to the plaintiff to sell the store at private sale; that the plaintiff refused to consent to a sale by the defendant, and declared that in case the defendant should attempt to sell, as the fee was vested in him, (meaning, as I understand it, the defendant,) he, the plaintiff, would publicly forbid the sale. The bond of the defendant to the plaintiff, of the 20th of *June*, 1786, is another item of proof on this point, and it states, that on that day the plaintiff had sold to the defendant in fee a certain lot,

[ \* 221 ]

and water lot; that the defendant was to permit the same to remain for the benefit of the copartnership, and that, after the termination of the partnership, he was to sell the same, and apply the proceeds as part of the stock of the company.

This is the evidence on the subject of title to the store; and, as to the possession of it, the evidence does not contradict, but confirms the report. The plaintiff was not in possession of the store, in point of fact, within the specified time: this he affirms in his examination before the master. In point of fact, the possession was in the defendant; and for the purpose of the question between the parties, as to the rent, the defendant is to be deemed in the exclusive possession; for he kept the key of the storehouse, and, of course, had the exclusive right and power of entering, and this too while the parties were carrying on this very litigious controversy against each other, on all their mutual rights and pretensions under their partnership concerns.

The proof of the title, and of exclusive possession in the defendant, is sufficient, unless the plaintiff is estopped by the recital in the deed of 1815, stating that a moiety of the lot had been conveyed to him in 1795.

The admission of counsel, to which I have referred, is to be placed out of consideration; for that was annulled by an order of the 30th of *June*, 1815, founded upon satisfactory proof, that it was signed under a mistake. The agreement signed by the plaintiff was founded on that admission of his counsel, and ought to fall with it, as being founded equally in mistake. The proof on this point is decisive; indeed, the agreement, by the terms of it, was not to affect the right of the plaintiff to charge the defendant with rent for the store, and, therefore, the recital contained in the agreement could not properly be used to the prejudice of that claim. We have only the recital in the deed of *January*, 1815, to contradict the proof of the whole legal title resting in the defendant. I am satisfied that the recital is not only not true in point of fact, but that its insertion arose from misapprehension and mistake, and was not distinctly understood or knowingly assented to by the plaintiff, at the time he executed the deed. It would then be very inequitable, and contrary to the policy of this Court, which has ample jurisdiction over the correction of mistakes in the most solemn instruments, to permit a recital, originating in mistake, and untrue in fact, to be now set up as a technical bar to the admission of the truth. There can be no doubt that the mistake contained in that recital might be corrected on a bill filed for that purpose; and it would be very unfortunate, and deeply to be regretted, if the Court, in the mean

1816.

STOUGHTON  
V.  
LYNCH.

[ \* 222 ]

Effect of a  
recital in a deed,  
not true in fact  
and founded in  
mistake.

1816.

STOUGHTON  
V.  
LYNCH.

time, with satisfactory proof of the mistake, was bound to give force to it on a question of evidence, merely under the notion of its being a dry, forbidding estoppel. I am not disposed to push the common law doctrine of estoppel to such a rigorous extent.

[ \* 223 ]

With respect to the further exceptions (as they are \*termed) on the part of the defendant, the 1st and 2d of them have already been considered.

The fifth further exception is, that, on the 3d of *July*, 1795, and at divers times previous thereto, the master has charged the defendant with divers sums, amounting to 9,819*l.* 19*s.* 5*d.* for interest on moneys received by him from the copartnership funds.

The charge of interest was in pursuance of the decree of the 6th of *July*, 1814, and is made upon moneys drawn out by the defendant, beyond what was necessary for his private expenses; and, as I have not hitherto had any reason to doubt of the correctness of that decretal order, I am not disposed to accede to this exception.

The conclusion is, that all the exceptions on the part of the plaintiff, and all the exceptions on the part of the defendant, except the third further exception, and the interest on the 600*l.* mentioned in the fourth further exception, are disallowed. With respect to the question of costs, arising on these exceptions, I am disposed to charge the parties respectively with the costs of the exceptions taken by them and disallowed; and with respect to the two instances, in which the exceptions taken by the defendant have prevailed, the sums in controversy were small, and the mistake such as the master would probably have corrected, if the objection had been made to him, and only a small part of the fourth exception was well made; and, therefore, I think it would not be reasonable, that the plaintiff, in respect to them, should be charged with the expense of an argument; and I shall not allow any costs on either side, as to the third and fourth further exceptions.

[ \* 224 ]

The report states, that the master has ascertained what would have been a reasonable rent for the store, for each year, since the exhibition of the bill on the 12th of *July*, 1805, to the first of *January*, 1815, and the exhibit (I.) annexed to the report, contains the sums. The rent, I am of opinion, ought to be charged to the defendant: the store, \*by the agreement of the parties, was to be appropriated for the common benefit, and if the defendant thought proper to keep the possession of it himself, and under his control, the consequence of his negligence ought not to fall upon the plaintiff; but, under the circumstances disclosed, I am not disposed to charge him with any more than the sums  
178

reported for rent, without interest; and in all these respects, the report must be recommitted to the master for correction.

1816.

Codd  
v.  
Codd.

N. B. The report was sent back to the master, to make the alterations and corrections, pursuant to this decree; and, on the 31st of *October*, he made a further report, which was read, and an order for its confirmation made absolute, and thereupon a final decree was entered. By this last report, the master found a balance of 25,076 dollars and 64 cents due from the defendant to the plaintiff.

---

---

Codd against Codd.

On a bill for a divorce, a feigned issue to try the truth of the charge of adultery will not be awarded, unless the adultery is specifically charged, and with that degree of certainty, as to time, place, &c., as may enable the defendant to meet the fact at the trial.

BILL for a divorce, for cruel usage. It stated the particulars, and then added, that "the complainant doth charge that the said defendant hath, in numerous instances, both before and since their separation, committed adultery in this state and elsewhere."

November 1st.

The answer denied the charges. A replication was filed, and the cause put at issue.

\*Burr, for the plaintiff, moved for a feigned issue to try the charge of adultery.

[ \* 225 ]

Baldwin, for the defendant, objected, on the ground that the charge in the bill, as to adultery, was too vague and general.

THE CHANCELLOR. The adultery is not sufficiently specified in the bill to award an issue in pursuance of the statute, which requires that the adultery should be *set forth* in the bill, and that the feigned issue should be made up for trial of the *fact of adultery charged* by the complainant, and denied by the defendant. Here is not the least information of certainty, as to time, place, or person, and the defendant cannot know how to meet so vague an accusation.

Motion denied.



1816.

SKINNER  
v.  
DAYTON.

A motion was afterwards made, on the part of the plaintiff, for leave to withdraw the replication, and amend the bill, which was granted, on condition that the defendant be served with a copy of the amended bill *gratis*, and to be allowed three weeks from the service of the order, to put in a new or further answer, if the same should be deemed necessary.

[ \* 226 ]

\* SKINNER *against* DAYTON and others.

If the party obtaining an injunction to stay proceedings at law, neglects to deposit the 100 dollars, at the time, pursuant to the 43d rule of the Court, the irregularity will be cured by his depositing that sum before a motion is made to dissolve the injunction ; but he must pay the costs of the motion. So, if he omits to enter the order for the injunction with the *register*, at the time, a subsequent entry of it, before motion, will cure the neglect, but he will have to pay costs.

Orders for injunctions, as well as other special orders, must be entered with the *register* or *assistant register*, not with the *clerk*, before the process issues.

November 5th.

BILL for an injunction to stay proceedings at law. The injunction was granted on the 28th of *September*, by a master, in the absence of the chancellor.

*Buel*, for the defendants, now moved to dissolve the injunction, for irregularity. He read an affidavit, stating, that the suit at law was noticed for trial at the *Albany* circuit, in *October* last, and that no deposit was made of the sum of 100 dollars, according to the rule (43d) of the Court ; and that no special cause was shown for not applying for the injunction before thirty days prior to the circuit in *Albany*. It was certified, that no order for the injunction had been entered with the register.

*Henry*, contra. He produced a certificate of the deposit of the 100 dollars, this day ; and urged that the fact of the judgment at law did not come to the plaintiff's knowledge, until the second or fourth day of *September*, and that the time between that day and the 28th of *September* was requisite to prepare the bill.

THE CHANCELLOR. The motion is founded on irregularity in issuing the process, and on the merits.

[ \* 227 ]

\*1. As to the irregularity. The omission of the deposit,  
180

in the first instance, is cured by the subsequent deposit, but the plaintiff must pay the costs of the present motion, which that omission was sufficient to justify. The time that elapsed after the complainant was informed of the judgment, and before the filing of the bill, was not unreasonable. To advise, prepare, and finish a bill requires a little time, especially where the party lives in the country. The omission to enter the order for the injunction with the register, arose probably from the loose but convenient practice of carrying the bill, in the first instance, to the clerk, who issues the process upon the production of the bill, with the allowance endorsed. But the omission to enter the order with the register may also be cured by the subsequent entry, subject, however, as in the case of the omission of the deposit, to the costs of the motion; and I shall, accordingly, allow the entry to be now made as of the time of the allowance of the injunction.

That orders for injunctions, as well as other special orders, must be entered with the register, or assistant register, and that the clerk's office is not the place for the entry of rules and orders, is the clear and settled course and practice of the Court. The books of practice speak this language uniformly. (*Solicitor's Guide*, 12. 473. 493. 500, 501. 1 *Harr. Ch. Prac.* 77. 231. 243. 265.) In *James v. Phillips*, (2 *P. Wms.* 657.) process of contempt was held irregular, because the return of the attachment on which an order for a sergeant at arms was grounded, was not entered in the register's office. Every order for an injunction ought regularly to be entered with the register or assistant register, before the process issues, and the allowance endorsed on the bill in vacation time is only intended as an authority to enter the rule. But if this entry cannot be made before issuing the process, without injurious delay, as when the register is absent, or the clerk resides at a distance, the party, or the clerk for him, ought \*to cause the rule to be entered, with all reasonable speed, as of the day of the allowance, otherwise the opposite party will be able to question the regularity of the process. It was one of the ancient rules in the *English Court of Chancery*, that the clerks in Court were carefully to see that all attachments issued by them were duly entered with the register. (1 *Harr. Prac.* 231.)

2. The injunction must be retained, until the coming in of the answer; but the plaintiff, for the reasons mentioned, is to pay the costs of this motion, and to cause the order for the injunction to be forthwith entered with the register.

1816.

SKINNER  
V.  
DATTON.

[ \* 228 ]

Injunction retained.

1816.

DODGE  
v.  
STRONG.

DODGE and others *against* STRONG.

Relief will not be granted for the purpose of a new trial at law, where the party lost his opportunity of defence, by his own negligence. Where a rule for a new trial was granted by the Supreme Court, on conditions which the party failed to perform within the time prescribed by the rule, this Court refused its aid, it not appearing that the failure arose from the act of the opposite party, or from unavoidable necessity.

November 9th.

[ \* 229 ]

THE bill stated, among other things, that, in *November*, 1814, one *Willoughby* delivered to the plaintiffs a quantity of *cider*, to be kept until it was sold, and the plaintiffs advanced to him 400 dollars, on his agreeing to permit the *cider* to remain as security for the advance, paying the storage, and giving them authority to sell the *cider*. That the plaintiffs, accordingly, sold the *cider*, the proceeds of which amounted to 478 dollars and 41 cents. That in *February*, 1815, the defendant demanded the *cider*, alleging that *W.* was his agent, and had no authority to sell it. That until that time, the plaintiffs always supposed *W.* to be the true and sole owner; but that he has since claimed to be a partner with the defendant in the *cider*. That the defendant had knowledge of the advance of the money by the plaintiffs, and of the transactions at the time, or before he brought his suit at law against the plaintiffs, and approved the same; and that he concerted with *W.*, before the advance was made, that he should procure it by depositing the *cider*, &c. That the defendant afterwards brought an action of *trover*, against the plaintiffs, in the Mayor's Court. which was removed into the Supreme Court. That the cause was noticed for trial at the *April* sittings in *New-York*. That the plaintiffs, some time before, intended to have *W.* as a witness, but that he could not, on inquiry, be found; and, in *April*, the plaintiffs were informed that *W.* was at *Teneriffe*, as a common sailor. That, from the date of the issue, the plaintiffs had no expectation that the cause could be called on to trial at the *April* sittings, and neglected to attend; but on the last day of the sittings, the cause was called, and an inquest taken by default, for 810 dollars. That the *cider* was estimated at 4 dollars 50 cents per barrel, but the plaintiffs sold it for only 2 dollars and 75 cents, and no credit was given for the storage, or interest on the advance. That application was made to the Supreme Court for a new trial, who granted a rule for that purpose, on condition that the plaintiffs paid the amount of the verdict into Court in four days, and also paid the costs of the sit-

tings, and of the motion; and that the defendant should notice the cause for trial, at the next sittings in *June*, and the plaintiffs then proceed to trial, without delay; and if the defendant should obtain a verdict, he might take the amount out of the money in Court, with the costs, and an execution issue for the residue, if necessary. That the plaintiffs deposited with the clerk of the Court the 810 dollars, in bank notes, within the four days, and their attorney went to the attorney of the defendant about the costs, \*and the defendant's attorney said the costs were not then taxed, and that a copy of the bill should be sent to the plaintiffs' attorney, who promised to pay it. That the bill was not sent, and the four days elapsed, and the defendant's attorney afterwards refused to receive the costs; that the non-payment of them, according to the rule of the Supreme Court, was wholly owing to the failure of the defendant's attorney to send the bill, according to his promise. That he, immediately after the four days, perfected his judgment, and issued an execution. That the plaintiffs applied to a judge of the Supreme Court for an order to stay proceedings, who refused it, on the ground that the plaintiffs had not fulfilled the conditions on which the rule for a new trial was granted, as the 810 dollars was not paid in *specie*, nor the costs paid within the four days. That the plaintiffs did not know that *specie* was required. The bill prayed for an injunction, &c., which was granted.

The *answer* of the defendant denied all the material facts charged, on which the equity of the bill was founded.

*W. Slosson*, for the defendant, moved to dissolve the injunction.

*H. S. Dodge*, contra.

THE CHANCELLOR. This is a motion to dissolve the injunction, staying execution at law, upon the coming in of the answer.

The object of the bill was to obtain a new trial at law. The defence of the present plaintiffs, if any they have, was legal and available at law, and if this Court could grant relief, it would be by requiring the present defendant to submit to a new trial. But it appears to me, after a very careful consideration of the case, as disclosed by the bill and answer, that I cannot retain the injunction consistently \*with the established doctrines of this Court. The plaintiffs, by their own negligence, or that of their attorney, suffered an inquest to be taken against them, by default, at the last *April* sittings, in *New-York*. They then applied

1816.

DODGE  
V.  
STRONG.

[ \* 230 ]

[ \* 231 ]

1816.

DODGE  
V.  
SMONG.

to the Supreme Court for relief, and relief was granted upon certain conditions, and those conditions were not fulfilled. Here was a second default, and this Court cannot now interfere. The answer of the defendant completely denies, not only every suggestion of equity contained in the bill, but every circumstance set up as an excuse for not performing the conditions upon which the rule, setting aside the inquest, was granted. It was the duty of the plaintiffs, within the time limited by the rule, to have deposited the money in Court, and given notice of it, and to have paid or tendered the costs. This they neglected to do, and the fact charged, that a copy of the taxed bill was previously, by agreement, to have been furnished to the attorney for the complainants, is denied. They should, at all events, have tendered a sum sufficient for the taxable costs, and left the opposite party to have taken out the true sum at his peril.

It is stated, in *Wyatt's P. R.* 145. that where a party is to pay costs for his default, he must procure them to be taxed, if he would set himself *rectus in curia*.

After so palpable a neglect of the cause, as occurred at the *April* sittings, and after so strict and precise a condition as that on which the subsequent relief was made to depend, it is surprising that the plaintiffs should have been so little on their guard; and it is impossible to expect aid in this Court, unless the failure to comply with the condition arose from the act of the opposite party, or some unavoidable necessity. There is no excuse for it set up on one side, but what is completely denied on the other; and in addition to this, we have the decision of the recorder, and also of a judge of the Supreme Court, each passing an \*opinion upon the validity of the excuse, and each rejecting it.

[ \* 232 ]

This Court has frequently declared, that relief cannot be had here for the purpose of a new trial at law, when the party has lost his opportunity at law, by his own negligence. I need only refer to the cases of *Lansing v. Eddy*, (1 *Johns. Ch. Rep.* 49.) *Simpson v. Hart*, (*Id.* 91.) *Smith v. Lowery*, (*Id.* 320.) and *Barker v. Elkins*, (*Id.* 465.) as containing not only all the *English* authorities which I have met with on the subject, but a full exposition of the principles on which the interference of this Court is, in such cases, denied. I am not at liberty to depart from a rule so fully established; and, however I may regret the misfortune of the plaintiffs, the motion to dissolve the injunction must be granted.

Injunction dissolved.

1816.

MATTER OF  
BARKER.

## In the matter of JAMES BARKER.

Where a person, from *old age*, sickness, or other cause, becomes so weak and incapacitated in mind as to be unable to manage his affairs, a commission, in nature of a writ *de lunatico inquirendo*, may be awarded; and where the inquisition of such a writ found the party, who was 85 years old, to be of "unsound mind, and mentally incapable of managing his affairs," a committee of his estate was appointed.

A PETITION of *John Barker*, and *Mary Dederick*, was November 12th. presented, stating, that they are the children of *James Barker*; that he now is, and had been, for four months past, so far deprived of reason and understanding, as to be wholly unfit and unable to manage his affairs; and praying that a commission, in nature of a writ *de lunatico inquirendo*, might issue, &c.

\*The affidavits annexed to the petition stated, that the petitioners were the only surviving children of *J. B.*, who was 85 years old; that he was seised of a large real estate, of great value, which was going to ruin and waste, &c. Many acts of *J. B.* were also stated, showing the imbecility of his mind, and his want of the understanding requisite for the management of his property.

[\* 233]

*J. V. D. Scott*, in support of the petition, cited *Ridge-way v. Darwin*, 8 *Ves. Rep.* 65.

THE CHANCELLOR. It is evident that *Barker*, the subject of this application, is not a lunatic, within the legal meaning of the term. He is not a person who sometimes has understanding and sometimes not. He is rather of that class of persons described by Lord *Coke*, (*Co. Litt.* 246. b.) as *non compos mentis*, who have lost the memory and understanding by sickness, grief, or other accident. The suggestion here is, that his mind is worn out by old age, so as to render him incapable of managing his property. It is represented that he has arrived to a state of second childhood, and stands in absolute need of the protection of the Court against his own acts, and against the practices of evil and designing men. The case, as stated, appears to be deeply interesting to humanity, and to present a strong appeal to the powers and justice of this Court. The difficulty which has arisen with me, is as to the extent of my jurisdiction. Mere imbecility of mind, not amounting to idiocy or lunacy, has not, until very lately, been considered in the *English* Court of Chancery, as sufficient to interfere with the liberty of the

1816.

MATTER OF  
BARNER.

[ \* 234 ]

subject over his person and property. I have not met with a case prior to our revolution which has gone so far. Lord *Hardwicke* disclaimed any jurisdiction over the case of mere weakness of mind ; yet it is certain that when a person becomes mentally disabled, from whatever cause the disability may \*arise, whether from sickness, vice, casualty, or old age, he is equally a fit and necessary object of guardianship and protection. The Court of Chancery is the constitutional and appropriate tribunal to take care of those who are incompetent to take care of themselves. There would be a deplorable failure of justice, without such a power. The object is protection to the helpless ; and the imbecility of extreme old age, when the powers of memory and judgment have become extinct, seems, as much as the helplessness of infancy, to be within the reason and necessity of the trust. I am aware, however, that the inquiry must, in many cases, be peculiarly delicate, because it concerns the character of the party, and his natural rights, and because of the difficulty there is in ascertaining the extent of the decay of the mind, necessary to form a proper case for the interference of the Court.

Under this impression of the subject, I have followed carefully the progress of the decisions, with a view to discover, as far as I was able, my authority and duty in the case.

In the time of Lord *Hardwicke*, it was understood that there was no specific relief for the case of incapacity from mere weakness of mind. This appears from the case *ex parte Barnsley*, in 1784, (3 *Atk.* 168. 3 *Eq. Cas. Abr.* 580.) in which, on a commission to inquire whether *Barnsley* was a lunatic, the inquisition found that, from weakness of mind, he was incapable of governing himself or his estate ; and the inquisition was quashed for insufficiency. The case was elaborately argued, and precedents searched, and Lord *Hardwicke* said, the finding must be that he was a lunatic, or, what was correspondent with that word, that he was of an unsound mind. It was not sufficient that he was weak and worn out with age, and incapable of managing his estate. He admitted that the law was possibly too strict, and that it might be useful that a *curator* or *tutor* should be set over prodigal and weak persons, as in the civil law. Lunacy was a technical term, and the \*Court could not depart from the legal definition, and, therefore, weakness of mind was not a sufficient reason for granting the custody of the person and estate : as, in that case, people of violent passions, drunkards, and careless and silly people, would be subject to a commission. Their acts might, in certain cases, be set aside on the ground

[ \* 235 ]

of imposition upon weakness ; but commissions of lunacy were not intended for such people.

The same doctrine was afterwards held by Lord *Hardwicke*, in Lord *Donegal's* case, (2 *Vesey*, 407.) and this appears to have been the declared sense and practice of the Court of Chancery in *England*, down to the period of our revolution. But that Court has since proceeded upon more liberal, and, as I think, more correct and just reasoning ; not, indeed, that they have introduced new principles of equity, but have rather made a more extensive and sound application of powers and principles already existing. If the Court, as Lord *Hardwicke* admits, will relieve against the acts of persons incompetent to manage their affairs from weakness and age, it is surely more wise to anticipate the case, and prevent the necessity of a subsequent interference. There are cases as ancient as the time of Lord *Talbot*, and Lord Keeper *Wright*, (*Leving v. Caverly*, *Prec. in Ch.* 229. *Anon.* 3 *P. Wms.* 111. note,) in which the Court has protected the weakness of very superannuated persons, whose minds had nearly perished, by admitting them, on due proof, by affidavit or otherwise, of such imbecility, to appear and answer by guardian ; and this course is still pursued in such cases. (14 *Vesey*, 172.)

The first intimation I have met with of a departure from the strict technical rules under which Lord *Hardwicke* held these commissions, is in 6 *Vesey*, 273., where Lord *Eldon* says, that evidence may support a commission not of lunacy, but in the nature of a writ *de lunatico inquirendo*, in which, he says, it must be remembered, that it is not necessary \*to establish lunacy ; but it is sufficient that the party is incapable of managing his own affairs.

This question arising on this enlarged jurisdiction of the Court, afterwards underwent a full discussion, by Lord *Eldon*, in *Ridgway v. Darwin*. (8 *Vesey*, 65.) He observed, that in Lord *Hardwicke's* time, commissions of lunacy were not granted to the extent in which they have been since granted. That when he came into the Court, he found a course of cases establishing its authority where the party was not absolutely insane, but was unable to act with any proper and provident management, and was liable to be robbed by any one, under that imbecility of mind, calling for as much protection as absolute insanity. When the mind was worn out by years, or epilepsy, or habitual intoxication, &c., the party required that care should be thrown around him ; and he held him to be a proper subject of a commission in the nature of a writ of lunacy ; and, until the legislature should take measures to preserve persons in a state of imbecility exposing

1816

MATTER OF  
BARKER.

[\* 236 ]



1816.

MATTER OF  
BARKER.

them to as much mischief as insanity, or these decisions should be reviewed, he should not undertake to alter them. The case before him was that of imbecility of mind in a lady, proceeding from epileptic fits, and he directed two physicians to visit her, and determine whether her mind was competent; and an order was eventually made, restraining her from executing any instrument, except under the limitations prescribed in the rule.

The same point, afterwards, came before Lord *Erskine*, in the case *ex parte Cranmer*. (12 *Vesey*, 445.) The return to the commission was, that the party was so far debilitated in his mind as not to be *equal* to the general management of his affairs; this was considered as too ambiguous, and the inquisition was quashed, and a *melius inquirendum*, or new inquiry, was directed. But the chancellor did not admit any defect of his jurisdiction, though he thought the power assumed was of immense moment, and \*pressed on the liberty of the subject. If the mind, as he observed, be disorganized by sickness, grief, or old age, who could say he had not jurisdiction, and why should not a man be protected in his second state of infancy as well as in the first? He felt, as Lord *Eldon* appears strongly to have felt, that persons who are, above all others, entitled to protection, should not go unprotected; and he considered that they came within that class of cases mentioned by Lord *Coke*, of persons *non compos*, if their understandings had become destroyed, by surviving the period that Providence has assigned to the stability of the mind.

[\* 237]

The question, as Lord *Erskine* observed, was, whether the party had become mentally incapable of managing his affairs.

I am satisfied that these later decisions are not only founded in good sense, and the necessity of the case, but are a sound exposition of the common law, which gave to the king, as *parens patriæ*, the care and custody of all persons who had lost their intellects, and become *non compos*, or incompetent to take care of themselves. (*Beverley's case*, 4 *Co.* 127, 128. 1 *Blacks. Com.* 304.) All the cases agree that the statute of 17 *Ed. II.*, committing to the king the care of the persons and estates of idiots and lunatics, was not introductory of a new right, but only went to regulate a right pre-existing in the crown. (4 *Co.* 126. *Amb.* 707. 2 *Vesey*, *jun.* 71. 75.) I should feel that I had but very imperfectly discharged my trust, if I was the means of crippling the jurisdiction of this Court, by confining it to the strict common law writ of lunacy. A numerous class of persons, whose minds have sunk under the power of disease, or the weight

of age, would, in that case, be left without protection, and liable to become the victims of folly or fraud. This would be a blemish in the jurisprudence of the country.

I shall, therefore, award a commission, in the nature of a writ of lunacy, to inquire whether *James Barker* be \*of unsound mind, or mentally incapable of managing his affairs; and I shall direct that he be present, for it is his privilege, so that the jury may have inspection of him.

1816.

MATTER OF  
BARKER.

[ \* 238 ]

Order accordingly.

N. B. The inquisition was taken and returned, finding that *James Barker* was, and, for one year preceding, had been, "of unsound mind, and mentally incapable of managing his affairs;" and, further, that he owned 5,000 acres of land, of the value of above 75,000 dollars; and that he had a son and daughter living, each upwards of 50 years of age, and a great number of grandchildren.

A committee of his estate was appointed.

1816.

MALIN  
v.  
MALIN.MALIN *against* MALIN and others.

A mere nominal trustee cannot bring a suit in his own name, but the *cestui que trust* must be joined.

If a person has religious scruples against being a party in a suit, he may, it seems, sue by his *prochein ami*.

Persons incompetent to protect themselves, from old age, weakness of mind, or from some delusion or fanaticism, are entitled to the protection of the Court.

November 14th.

THE bill stated, that a religious society was formed at *Jerusalem*, in the county of *Ontario*, denominated "The Society of Universal Friends," of which *Jemima Wilkinson* was the founder and head. That for the support of *Jemima*, and the poor of the society, she purchased, on the 5th of *January*, 1792, certain lands, in the bill described, and paid the purchase money, and that, as a rule of the society forbade any estate being vested in her, she nominated one of her followers, by the name of *Sarah Richards*, to be her trustee, and the deed was taken in the name of the \*said *Sarah*, without any expression of the trust in the deed. That *Sarah Richards* died on the 29th of *December*, 1795, and by her will devised the lands in question to the plaintiff, and devised other property to her only child, *Eliza Richards*. That the said *Eliza*, afterwards left the society, and married the defendant, *Enoch Malin*, and owing to some alleged imperfection in the devise, the defendants lay claim to the lands in question, under the said *Eliza*, and have entered thereon. That the said *Jemima* is restrained by her profession and conscience from becoming a party to any suit or proceeding at law whatever.

[ \* 239 ]

The defendants having answered the bill, and issue being joined, and proof taken, the cause was brought on to a hearing.

*Gold*, for the plaintiff.

*E. Williams*, for the defendants.

It was objected, at the opening of the cause, at the hearing, that *Jemima Wilkinson* ought to have been made a party plaintiff, as she was the only person equitably entitled, according to the showing in the bill; and it was answered, that she could not be prevailed on, from scruples of conscience peculiar to the sect, to become a party.

THE CHANCELLOR. As *Jemima Wilkinson* is the *cestui que trust* of the lands in question, from the showing in the bill, and the present plaintiff is but a mere nominal trustee, it is indispensable that she should be made a party, to entitle her to relief. The case of *Kirk v. Clark* (*Prec. in Ch.* 275.) is precisely to the point; and the same rule was declared in *Adams v. St. Ledger*, (1 *Ball & Beatty*, 181.) The cause must, therefore, go off, to the end that the *cestui que trust* be made a party. In the case of *Kirk v. Clark*, the objection was taken, as in this case, at the hearing, \*and the chancellor ordered the bill, answer, and depositions to stand, and the next day the *cestui que trust* was made plaintiff, by her next friend. If *Jemima W.* has religious scruples which cannot be surmounted, and this shall be made to appear, either by affidavit or the report of a master, as may be directed, perhaps she may be permitted to become plaintiff by her *prochein amy*. A person incompetent to protect himself, from age, or weakness of mind, or from some religious delusion or fanaticism, *quem urget fanaticus error vel iracunda Diana*, ought to come under the protection of the Court.

1816.

MALIN  
v.  
MALIN.

[ \* 240 ]

N. B. The counsel, afterwards, mutually consented that the name of *Jemima W.* should be added as a party plaintiff, and the cause, on the same day, proceeded to a hearing.

1816.

DUMOND  
v.  
MAGEE.

DUMOND, administrator, &c., *against* MAGEE and others.

Where a bill was filed by an administrator, for a decree for the distribution of the intestate's estate, the answer of a person entitled, as next of kin, to a distributive share, signed by her attorney in fact, and not sworn to, or subscribed by the party himself, was received, as the party resided in *Ohio*, and the object of the suit was merely for the security of the administrator.

*November 25th.*

THE object of the bill was to obtain a decree for the distribution of the estate of the intestate among the next of kin, so that the administrator might be protected. The defendant *Catharine Hauett* was one of the next of kin, and one of the claimants of a distributive share.

[ \* 241 ]

*M. I. Cantine*, for the plaintiff, moved that the answer of the defendant *Catharine Hauett* might be taken, without \*her oath or signature, on an affidavit which he read, that she resided at *Miama*, in the state of *Ohio*; and that she had given a full power of attorney, which was set forth in the affidavit, duly executed and authenticated, to her son, *Anthony Hauett*, residing within this state, to act for her, and collect her debts, and to demand the same by suit, or otherwise, and to compound for the same, &c.

THE CHANCELLOR. This is not a case in which a discovery is the object of the bill. As it is merely a suit for the safety of the administrator, the object of the motion is reasonable, and it would cause great and useless delay, trouble, and expense, to send a commission to the state of *Ohio*, for the sole purpose of taking her answer. The case of *Gwillin*, (6 *Ves.* 285.) of *Bayley v. Delvalkiers*, (10 *Ves.* 441.) and of *Harding v. Harding*, (11 *Ves.* 159.) are authorities in support of this course of proceeding.

Order accordingly.

It was directed that the answer should be subscribed by her attorney, and with a copy of the power of attorney annexed thereto.

1816.

EXECUTORS  
OF BRASHER

V.  
VAN CORT-  
LANDT.

\*THE EXECUTORS of BRASHER *against* W. VAN CORTLANDT, a lunatic, by W. & P. VAN CORTLANDT, his committee.

A creditor of a lunatic may file a bill for the payment of his debt, against the committee of the lunatic, without making the lunatic himself a party.

Where the lunatic was named as a party in the bill, with his committee, and the *subpoena* issued in a cause entitled against the committee alone, without naming them as a committee; and they entered their appearance in the cause as so entitled, while the plaintiff proceeded in the cause as entitled in the bill, and took the bill *pro confesso*, for want of an answer, and went on to a final decree, it was held, that the committee were too late to object to the irregularity, after taking a copy of the bill, and tacitly suffering the plaintiffs to go on to a decree.

The party who wishes to avail himself of an irregularity in the proceedings of his adversary, must make the objection the first opportunity after he has knowledge of it, or has sufficient information to put him on inquiry as to the fact.

Where a creditor wishes to obtain payment of his debt out of a lunatic's estate, and no inventory of the estate has been filed by the committee of the lunatic, according to the statute, the proper course is to cause the committee, by citation or otherwise, to file the inventory, and to present a *petition* to the Court, stating the amount of the estate, debts, &c.

Where the real estate of a lunatic is ordered to be sold, the sale is to be conducted by the committee, not by the master; but he, or some other person, may be joined with the committee for that purpose, and to execute the conveyance.

THE bill stated a debt due to the mother of the testator from the lunatic, who assigned it to the testator, &c., amounting to 509 dollars and 48 cents; that a commission of lunacy issued against *W. V. C.* defendant, and he being found a lunatic, his two sons were appointed a committee, &c. That they neglected to file an inventory of the lunatic's estate, &c., pursuant to the directions of the statute; that the plaintiffs do not know what is the amount of the personal estate of the lunatic, but his real estate consisted of a farm in *West Chester* county, of 400 acres, and more than sufficient to pay all his debts, &c. November 29th.

The bill prayed that the committee might be decreed to file an inventory of the lunatic's estate, &c., according to the statute; and that if the personal estate should be found insufficient to pay the debts, that a sale might be directed of so much of the lunatic's real estate as would be sufficient to pay the debt due the testator, and the costs, &c.

On the 3d of *January*, 1816, the bill was taken *pro con-*  
VOL. II. 25 193

[ \* 243 ]

1816.  
 EXECUTORS  
 OF BRASHER  
 V.  
 VAN CORT-  
 LANDT.

*fesso* against the defendants; on the 21st of *June* an order of reference was made to a master to ascertain the amount of the real and personal estate of the lunatic, and of the debt, &c. The master made his report on the 13th of *September*, and the cause was set down for a hearing on the 30th of *September*. A decree was entered for the sale of so much of the real estate of the lunatic as would be sufficient to pay the debt, (the principal and interest of which the master reported to be 736 dollars and 24 cents,) and the costs.

A *petition* of the *committee* of the lunatic was now presented, praying that all the proceedings in the cause, subsequent to the filing of the bill, might be set aside for irregularity. The petition stated, that the bill prayed process of *subpœna* against the committee, as the committee and guardians of the lunatic, to appear and answer. A *subpœna* issued against the defendants without styling them a committee, &c., returnable on the 15th of *June*, 1815. On the 7th of *July*, an order was entered, that *W. R. Van Cortlandt*, one of the defendants, appear and answer in six weeks, or that the bill be taken *pro confesso* against him. That the defendants (the committee) caused their appearance to be entered on the 10th of *July*, 1815, in a cause of the plaintiffs *against* them, and gave notice of the appearance to the plaintiffs' solicitor. On the 15th of *November*, an order was entered by the plaintiffs, as of course, in the above entitled cause, that the defendant *P. Van Cortlandt* file his answer in six weeks, or that the bill be taken *pro confesso*, no copy of which order or notice thereof was served, and on the 3d of *January*, 1816, an order was entered that the bill should be taken *pro confesso*. All these orders were given on certificates of the \*clerk, in a cause of the plaintiffs against the committee only, the two defendants, in their private capacity, without styling them a committee, &c.

[ \* 244 ]

The lunatic has never appeared, &c. Notice was received that the cause would be brought on to a hearing, on the 20th of *June*. On the 7th of *August* the solicitor of the defendants received a summons to attend before the master, and another summons on the 13th of *September*; and, on the 20th of *September*, he received notice of hearing for the 30th of *September*, but all these notices were in the cause entitled as in the bill, and not in the one in which the defendants appeared.

The affidavit of the solicitor of the committee was read in support of the petition, stating, that he entered their appearance in a suit of the plaintiffs, *against them*, according to the subpœna, and that no notice, pleading, or paper, entitled in such cause, had been received by him.

The clerk certified that he delivered a copy of the bill to the solicitor of the defendants in *June*, 1815: that he issued the subpoena, but omitted the addition of the plaintiffs as executors, and of the defendants as committee, believing those additions unnecessary in the process; and such being his practice.

The solicitor of the plaintiffs stated, in an affidavit, that when he received the subpoena from the clerk, he objected that the additions were not mentioned, but the clerk said they were unnecessary, as they would always appear in the bill. That when he received notice of the appearance of the defendants, (the committee,) he did not inspect the title of the cause particularly, but supposed it to be according to the title in the bill, &c.; and that the plaintiffs have filed no other bill.

*Henry*, for the defendants, in support of the petition.

*Th. Sedgwick*, contra.

\*THE CHANCELLOR. Several objections are taken on the part of the defendants to the regularity of the proceedings.

1. The lunatic himself is not made a party defendant.

The bill contains no prayer for process against the lunatic, and, therefore, he is not technically, and according to the established test, a party to the bill. (*Fawkes v. Pratt*, 1 P. Wms. 592. *Windsor v. Windsor*, *Dickens*, 707. 15 *Vesey*, 164.) The bill is against the committee, and seeks payment of a debt due from the lunatic; and the question arises, whether the lunatic ought to have been joined with his committee as a party defendant. If he had been joined, it would seem to be mere matter of form, and the committee would have been directed, as of course, to put in his answer, as his guardians. It would have been their answer, though in his name. If he be made a defendant, he is to answer by his committee. (*Dickens*, 233. 460.) When the committee are made defendants, there can be no use in joining the lunatic also, for the custody of the estate is no longer in him, but in this Court, under the administration of the committee. Though the books speak of the lunatic as a proper party, (*Lloyd's case*, *Dickens*, 460.) yet I do not perceive its necessity. The payment of the debts due from the lunatic is now usually sought, by a petition to the Court, as the funds are supposed to be under its entire control. Thus, in the case *ex parte M'Dougal*, (12 *Vesey*, 384.) the chancellor observed, that the universal course was, where a petition was presented for the payment of a debt due from the lunatic, to apply the fund in discharge of the debts; and, if there

1816.

EXECUTORS  
OF BRASHER  
V.  
VAN CORT-  
LANDT.

[ \* 245 ]

A lunatic himself need not be made a party to a suit, by a creditor, against his committee, to obtain payment of a debt out of his estate.



1816.

EXECUTORS  
OF BRASHER  
V.  
VAN CORT-  
LANDT.

[ \* 246 ]

be any reasonable doubt of the debt, it must first be made the subject of consideration at law. So, in the case *ex parte Hastings*, (14 *Vesey*, 182.) the petition was on the part of the committee, praying that the lunatic's debts might be paid out of a fund, in bank, to prevent the arrest of the lunatic at law; and Lord *Redesdale* said, \*(2 *S. & Lefroy*, 439.) that the Court would, on application, order possession to be delivered, by the committee, to the undisputed heir of the lunatic, on his death, without putting him to his ejectment.

Until the statute of 43 *Geo. III.*, there was no special authority given to the Court, or to the committee of the lunatic, in *England*, to sell or mortgage his real estate for the payment of his debts. The Court did not conceive it to be any part of its duty, or that it had the power. (2 *Vesey*, jun. 73. 74. 14 *Vesey*, 182. 8 *Vesey* 79.) The *English* cases are not, therefore, quite applicable on this point. The custody of the lunatic is committed, in *England*, not to the Court of Chancery, but to an individual selected by the crown, who is generally, though not always, the person who has the custody of the great seal. (3 *Atk.* 635. *Dickens*, 553.) But here the charge of the person and estate of the lunatic, and his maintenance, is expressly committed to the chancellor; (*N. R. Laws*, vol. 1. 147.) and the duty of providing for the payment of the debts is specially enjoined. For this purpose, the committee is to exhibit, under oath, within six months from his appointment, an inventory of the estate, debts, and credits of the lunatic; and when the personal estate shall be insufficient for the discharge of the debts, he is to present a petition to the chancellor, setting forth the particulars and amount of the estate and debts. If the personal estate shall appear to be insufficient, it is made the duty of the chancellor to cause so much of the real estate to be sold as shall be necessary for the discharge of the debts. These provisions render the payment of the debts out of the lunatic's estate no longer a matter of discretion, but of indispensable duty; and they contemplate the committee as being charged, (though, undoubtedly, under the control and direction of this Court,) with a trust to be performed for the benefit of creditors, and an agency in the payment of the debts and the administration of the estate. To what extent

[ \* 247 ]

\*these new duties of the committee may necessarily lead, I need not now examine, nor am I altogether prepared to say. The view of the subject under our statute is, certainly, greatly varied from that under the *English* law; and I entertain no doubt that the committee may be called upon in this Court by the creditors for the payment of their debts, without making the lunatic a party.

This question of necessary parties is always more or less

a matter of discretion, depending on convenience. In this case, it would be quite absurd to bring in a party who has no capacity or power of action, except by the very persons already before the Court as his trustees, and when the Court is only to look to the certainty of the debt, and to the state of the assets, in order to provide for its payment.

2. Another objection is, that the appearance of the defendants in pursuance of the *subpœna* was in a suit of the plaintiffs against them individually, and not in their official capacity as committee; and that, as all the subsequent proceedings of the plaintiffs were against them as a committee, no notice was taken of them, as if the proceedings were not in the suit to which they had appeared.

I apprehend that the defendants are too late with this objection, whatever consideration might have been due to it, if it had been made on the return of the *subpœna*, and the entry of the appearance. There was no bill filed by the plaintiffs, but the one in the suit against the defendants, as committee, in which the existence and history of the debt against the lunatic, and of their neglect or refusal to pay it, after admission of its being due, is particularly set forth. A copy of this bill was taken by the solicitor for the defendants, before their appearance. If the *subpœna* was not properly filled up, according to the prayer in the bill, and they were not properly entitled by their addition, why was not the objection made in season? They were informed of the contents of the bill. I shall \*consider the process and appearance as sufficiently applicable to that bill, and the defendants shall not now be permitted to deny it. It is not to be tolerated in this Court, which is governed by substance, and not by forms, that the party, after taking a copy of the bill on which the *subpœna* had issued, and in which he was properly entitled, and entering his appearance without his addition as committee, shall lie by silently, and suffer the complainant to go on, unsuspectingly, step by step, down to a final decree, on the ground of a valid appearance, and then start up with the objection that he had never appeared in that suit. I can only say, that such a course of practice will never answer any purpose here.

3. Another objection is, that the defendants having entered their appearance on the 18th of July, 1815, they were entitled to the service of a special rule to answer, before the bill could be taken against them *pro confesso*.

The rule for taking the bill *pro confesso*, without the service of any special order for that purpose, was entered on the 3d of January last. Since that time a general rule has been provided for the case of neglecting to answer after appearance; but the decision in *Caines v. Fisher*, (1 Johns.

1816.

EXECUTORS  
OF BRASHER  
v.  
VAN CORT-  
LANDT.

A party who takes a copy of a bill filed against him as committee of a lunatic, and enters his appearance without his addition of committee, &c., cannot, afterwards, after suffering the plaintiff to go on to a final decree, object that the *subpœna* was against him individually, and not as committee, &c.

[ \* 248 ]

u

This Court looks to substance and not to form.

Before a bill can be taken *pro confesso*, a special order for that purpose must be entered.

1816.

EXECUTORS  
OF BRASHEER  
V.  
VAN CORT-  
LANDT.

[\* 249]

*Ch. Rep. 8.*) had then been made, requiring such a special rule to be served, before the entry of the order to take the bill *pro confesso*. The entry of the order of the 3d of *January* was, therefore, irregular, and if the defendants had applied to set that order aside as soon as they had knowledge of it, and due opportunity to apply, they would have been heard. But it is admitted in the petition, that the defendants, by their solicitor, received notice on the 1st of *June* last, that the cause would be brought to a hearing on the 10th of that month, in order to obtain a reference. This was sufficient information to put them on inquiry, and it was decided evidence that their default had been entered. It is further admitted, that an order of reference was obtained on the 21st of *June*, \*and that notice was received by their solicitor on the 7th of *August*, to appear before a master on the subject of the reference; that a further notice was received by him, on the 13th of *September*, to hear the report, and that on the 20th of *September* another notice was received, that the cause would be brought to a hearing on the master's report on the 30th of *September*. It is, lastly, admitted in the petition, that a final decree was entered on the 30th of *October*, and no reason whatever is given why the defendants have preserved silence until this time. If an irregularity in practice can be waived in any case, this must be that case; for the rule requiring a special order on the defendant, who has appeared to answer after the expiration of the first ordinary rule to that effect, was intended for his benefit, and is, in fact, an indulgence not granted to defendants who neglect to appear. There is good sense and justice in the practice in the Courts of law, that a defective notice or rule is deemed to be cured, and a default is deemed to be waived, by the neglect of the opposite party to complain of it, as soon as it comes to his knowledge. The reason of that practice applies to this case, in its full force. The defendants, with knowledge of the facts, suffer the plaintiffs to go on, unconscious of the mistake, and to accumulate labor and expense, until the cause arrives to the final decree, before they make any suggestion of the omission of the service of the second rule on them to answer. They do not even pretend that they have any merits or defence to make. If a person will be silent, when, in conscience, he ought to speak, it is equity that he be debarred from speaking when conscience requires him to be silent. The defendants, therefore, come too late with this objection.

4. The last objection is, that by an order of the 19th of *September* last, the master's report was to stand confirmed, unless cause was shown to the contrary in eight days, and

\*yet that by an order of the 23d of *September*, being within the eight days, the cause was set down for hearing on the report, for the 30th of *September*.

The answer to this is, that the setting down the cause within the eight days, for a day subsequent to the expiration of them, was a preliminary measure, which did not prevent the defendants, if they had so been inclined, from showing cause against the report within the eight days, or afterwards, when the cause was to be brought on to a hearing on the report of the 30th of *September*. They never availed themselves of any opportunity of showing cause, either within the eight days, or afterwards at the term, but evidently and intentionally waived it. They have sustained no prejudice by this proceeding. They do not pretend to any. The report was not confirmed until the 30th of *October*. The objection applies only to a point of formal and regular practice; and if it was, in itself, well founded, the defendants have justly lost the benefit of it by not making it in season.

5. But there are objections to the form of the decree, as it now stands, which appear to me to be well founded.

The bill charges, and the master reports, and the defendants, by suffering the bill to be taken *pro confesso*, admit, that there is no personal estate of any consequence, it being insufficient to pay any material part of the debt. It would, however, have been more regular to have caused the defendants, by citation, or otherwise, to have filed their inventory as the statute enjoins, and to have stated, by petition, the particulars and amount of the estate and debts, to have enabled me to judge, in the first instance, of the situation of the estate. But, notwithstanding the defendants may have omitted their duty, yet I apprehend that the real estate can be sold, if the insufficiency of the personal estate is made out to my satisfaction, by the same proof, in substance, as it is, in this case, by the charge in the bill, \*the order for taking it *pro confesso*, the report of the master, and the petition of the defendants.

The decretal order is, however, defective in this respect, that it directs the real estate to be sold by the master, whereas the statute evidently contemplates that the committee shall be a party to the sale and conveyance, after a report of the sale shall, previously to the execution of the deed, have been made and confirmed. A master, or other person, may, however, be joined with the committee in conducting the sale and executing the deed, and the time and manner are subject to my direction.

I shall, accordingly, set aside the decretal order of the 30th of *October* last, with liberty to the plaintiffs to set down the cause again for hearing at the next term, to the end that

1816.

EXECUTORS  
OF BRASHER  
V.  
VAN CORT-  
LANDT.

[ \* 251 ]

1816.

DAVOUE  
V.  
FANNING.

the deficiencies in this decree may be supplied; but the defendants shall not be entitled to any costs of this application as against the plaintiffs; and I shall further direct, that the defendants file an inventory, as the statute directs, by the first day of the next term, or show cause to the contrary.

Order accordingly.

[ \* 252 ] \*DAVOUE *against* FANNING, ANN his wife, and others.

A testator bequeathed legacies to each of his seven children, "to be paid out of the bulk of his estate;" and if his executors found that the estate fell short of the amount of legacies, then they were to make an abatement in proportion; and he, afterwards, directed that so much of his real estate as should be necessary to furnish the sums bequeathed, should be sold at public auction, when his children should attain full age, and the remainder be leased by his executors; and that when the youngest child arrived at full age, all his real estate and property, not otherwise disposed of, should be sold, and the proceeds, with the amount of the personal property, be divided among the children, &c. It was held, that the sole acting executor had power to sell the real estate under the will.

If a trustee, or person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestui que trusts* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale, under the direction of the Court. And it makes no difference in the application of the rule, that a sale was at public auction, *bona fide*, and for a fair price, and that the executor did not purchase for himself, but a third person, by previous arrangement, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestui que trusts*, and had an interest in the land under the will of the testator.

December 3d.

THE plaintiff is an infant daughter of *Frederick Davoue*, deceased, who, by his last will, bequeathed to her, and her sister *Ann*, (one of the defendants, and wife of the defendant *Fanning*,) 5,000 dollars each, "to be paid out of the bulk of the property," when they should become of age, or marry. The testator directed, that so much of his real estate, as should be necessary to furnish the sums he had therein before bequeathed to his children, should be sold at public auction, when his children should attain to full age, &c., and the remainder of his real estate to be leased or rented, by his executors.

The bill charged, that the defendant *Fanning*, the sole acting executor, pretending that the personal estate was insufficient

200

to pay the debts and legacies, sold a lot of ground, in *New-York*, though he had no authority by the \*will to do so, and that he caused the same to be purchased by *Hedden*, the defendant, for himself, or in trust for his wife, the said *Ann*, which was not lawful, and to the injury of the plaintiff; and that since the sale, *Fanning*, the defendant, had caused buildings to be erected on the lot, and, on the 25th *August*, 1815, mortgaged the property to the defendant *Ashfield*, to secure 3,000 dollars, payable in one year, which sum was borrowed towards paying the expense of the buildings. The bill prayed, that the sale of the lot might be set aside, and the premises resold, &c.

1816.

DAVOUE  
V.  
FANNING.

[ \* 252 ]

The *answer* stated, that there was not property enough to pay the debts and legacies; and that *Fanning* was the sole acting executor of the testator, and that he caused the lot to be sold at auction, as, he alleged, he had authority to do, under the will. That to secure to the defendant *Ann* her legacy, for her and her children, independent of her husband, she and her husband requested the defendant *Hedden* to attend the sale at auction, and purchase the lot for her, if it should be sold for less than 4,000 dollars; that the defendant *Hedden* attended the sale, and bought the lot for 3,800 dollars, for the said *Ann*; and the answer denied, that the defendant *Fanning* had any other or further concern in the purchase, which the defendants insisted was correct and proper, and in no way injurious to the plaintiff. That the defendant *Fanning*, as sole acting executor, on the 29th of *July*, 1815, executed a deed for the lot to *Hedden*, in trust for the sole and separate use of the defendant *Ann*, and to be at her own disposal. That *Fanning* received no money or other consideration, but only, as executor, credited the 3,800 dollars on account of the legacy due to his wife. That the defendant *Ann* has erected the buildings on the lot, and she and *Hedden*, and the defendant *Fanning*, in her behalf, mortgaged the premises to the defendant *Ashfield*, for \*3,000 dollars, payable in one year from the 25th of *August*, 1815, for which they gave their joint bond; that the whole of the money borrowed was applied towards the cost of the buildings, and that about 2,500 dollars still remains due for the expenses of the buildings. The defendants insisted that the mortgage was valid, and ought first to be paid, and the residue of the moneys due ought to be charged on the lot, if the sale should be rescinded; or if the defendant *Fanning* is to be responsible for the sums due, the defendant *Ann* ought to hold the property; but that if the property is resold, so

[ \* 254 ]

1816.

DAVOUE  
v.  
FANNING.

much of the proceeds as belong to her ought to be appropriated for her separate use, &c.

The cause came on to be heard, on the bill and answer.

*Van Wyck*, for the plaintiff.

*T. A. Emmet*, for the defendants.

Power of a sole  
acting executor  
to sell the real  
estate of the  
testator under  
the will.

THE CHANCELLOR. 1. The first question arising upon this case is, whether the sole acting executor, who was the defendant *Henry Fanning*, was authorized under the will, without the direction of this Court, to sell any part of the real estate.

If all the executors named had the power by the will, then the sole acting executor has the power by the statute, (*N. R. L.* vol. 1. p. 366.) on the neglect or refusal of the rest of the executors to act.

The will directs that the real estate be sold at public vendue, when it shall become necessary to raise money for the legacies, or when all the children are of age; but it does not say expressly *who shall sell*, though I think, as Lord *Hardwicke* did in a case somewhat similar, (*Black v. Willer*, 1 *Atk.* 420.) that it is a very reasonable construction, that the power was given to the executors. It seems almost impossible to mistake the testator's meaning on \*this point. He directed that an inventory of the *real* and personal estate should be taken by the executors; that they were to give the younger children such education as they should think proper; that the legacies of 2,000*l.* to each of the seven children, were to be paid out of "the bulk of the estate," as they should respectively become of age; and that if the executors should find that "the estate" fell short of the legacies, they were to make a deduction and apportionment, according to a rule prescribed. The testator then adds, "I will and direct, that so much of my real estate as shall be necessary to furnish the sums which I have heretofore bequeathed to my children, shall be sold at public vendue, when they shall attain the full age to possess the same, and the remainder of my real estate to be leased or rented by my *executors*; and that when my youngest child shall have attained unto full age, that then all my real estate and property, not otherwise disposed of, be sold, &c., and the proceeds, with the amount of the personal property, be divided among the children," &c.

It is to be observed, that the will directs that the personal property be immediately sold, and the proceeds put at interest, &c., but it is equally silent as to the persons who are to sell it.

1816.

DAVOUR  
V.  
FANNING.

The object of the power to sell was to raise money for the legacies, which it is, of course, the duty of the executor to discharge; and the will regulates the sale, by declaring it to be at public auction, which it would not have done, if it was intended that the sale should not be made by the constituted agents of the will, but under the directions of this Court. Indeed, taking the whole will together, I think it is a very necessary conclusion, that the executors were the persons intended by the testator to execute the power to sell.

2. The next and principal point in the case is, whether the plaintiff is not entitled to set the sale aside, because the executor, by a previous arrangement, suffered the property \*to be purchased in for his wife, and executed a deed in pursuance of the sale in trust for her.

[ \* 256 ]

It is contended, on the part of the defendants, that this sale is not open to objection, inasmuch as it was at public auction, and *bona fide*, and for a fair price, and the purchase was not made for the benefit of the executor himself, but for the benefit of his wife, who was one of the *cestui que trusts*, having an interest in the land. But I am of opinion that these circumstances do not vary the application of the general rule.

The executor, in selling a part of the estate to raise a particular legacy, was acting as a trustee for all those who were interested in the estate under the will, and not exclusively for the benefit of his wife, whose particular legacy he was raising. The plaintiff, and all the other children, had an equal interest with the defendant's wife that the property should be sold to the best advantage, because the greater the price, the greater would be the dividend of the residuary estate. They were all equally *cestui que trusts* of the executor; for he was charged with the duty of applying the proceeds of the estate to their use, and of eventually selling the whole real estate for distribution among them. If, in selling a part of the estate, in the mean time, for a legacy to his wife, he could become the purchaser on her account, or constitute an agent for that purpose, the temptation to abuse of trust would be great and dangerous. Whether a trustee buys in for himself or his wife, the temptation to abuse is nearly the same. Though the money he was raising was to go to the wife, it was no reason why he should be permitted to buy in for her the *estate itself*, when the plaintiff and others had also legacies to be raised out of the estate, and were equally entitled to their share of what should be remaining. His interest here interfered with his duty. *Emptor emit quam minimo potest; venditor vendit quam maximo potest.* Indeed, the very fact that the executor was,



1816.

DAVOUE  
v.  
FANNING.

Where the trustee himself becomes a purchaser of the trust estate, the *cestui que trust* may, of course, come in and set aside the purchase, and have the property re-exposed to sale.

And it makes no difference whether the sale was at public auction, and *bona fide* for a fair price, or otherwise.

in that instance, exercising the general \*powers of his trust for the benefit of his wife, was peculiarly calculated to touch and awaken the suggestions of self-interest. The case, therefore, falls clearly within the spirit of the principle, that if a trustee, acting for others, sells an estate, and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here, as of course, and set aside that purchase, and have the property re-exposed for sale.

I consider this to be a sound and settled doctrine of the Court. But as the point is extremely important, and has been long and greatly agitated, it will be safer, and certainly more satisfactory to the parties, that I should not only lay down the rule, but look into the authorities on which it is supported.

The earliest case I have met with, containing any full recognition of the principle, that a trustee cannot act for his own benefit on a subject connected with the trust, is that of *Holt v. Holt*, in the 22 Car. II., (1 Ch. Cas. 190.) where it was held, by the Lord Keeper *Bridgman*, assisted by the judges, that if an executor in trust renewed a lease, it should be for the benefit of the *cestui que trust*. The next case that occurs was that of *Keech v. Sandford*, before Lord Ch. King, in 1726. (3 Eq. Cas. Abr. 741.) A lease of the profits of a market was devised to a trustee, in trust for an infant; before the expiration of the term, the trustee applied to the lessor for a renewal for the infant's benefit, which he refused, because he could not distrain, but must rest singly on covenant, which the infant could not make. The trustee then took a lease to himself, and the chancellor decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from the covenants in the lease, and the trustee account for the profits since the renewal. He said he must consider it a trust for the infant, "for if the trustee, on refusal to renew, might have a lease to himself, few trust estates would be renewed to \**cestui que trusts*; and though it might seem hard that the trustee was the only person of all mankind who might not have the lease, yet it was very proper that the rule should be strictly pursued, and not in the least relaxed, for it was very obvious what would be the consequence of letting trustees have the lease on refusal to renew to *cestui que trusts*."

If we go through all the cases, I doubt whether we shall find the rule and the policy of it laid down with more clearness, strictness, and good sense. This decision has never been questioned; and that a trust results on the renewal of an infant's lease, has since been regarded as a familiar point. (1 Bos. & Pull. 376.)

1816.

DAVOUE  
V.  
FARRING.

The general principle was first brought before Lord Hardwicke, in *Davison v. Gardner*, in 1743, and the rule was admitted with rather more relaxation than is tolerated at this day, if we can rely upon the account of this MS. case, as it is variously stated in some of the elementary compilers. (1 *Cruise's Dig.* 551. *Sugden's Law of Vendors*, 436.) The case was a purchase of a *feme covert* of her interest in a brew-house. She acted at the time as a *feme sole* in respect to her separate estate, and the defendant, who purchased of her, was her trustee. The chancellor would not set aside the sale, because she received the full value, and the purchase was fair. I do not know that this case differs, in this respect, from the later decisions, for they all allow a trustee to purchase from the *cestui que trust*, under very special and guarded circumstances, amounting to a fair and distinct dissolution of the trust connection between them, at the time of the purchase. Lord Hardwicke observed, that the Court always looks with a jealous eye at a trustee purchasing of his *cestui que trust*; and he would not permit any purchase, by a trustee, during the minority of the *cestui que trust*; but he said, that where there was a decree for the sale of the trust estate, and an open auction by the master, or a \*public sale, by proclamation, in the country, there the Court had permitted a trustee to purchase, by refusing to set aside the sale, when all other circumstances were fair. I apprehend these latter *dicta* are clearly overruled, and that whether the *cestui que trust* be an infant or an adult, and whether the sale be public or private, the trustee is equally disabled from becoming a purchaser of the trust estate. The next case before Lord Hardwicke was that of *Whelpdale v. Cockson*, in 1747. (1 *Vesey*, 9. 5 *Vesey*, 682. S. C.) That was a bill by a creditor against the defendants, as executors and trustees. The answer admitted a purchase at auction of part of the estate, and the chancellor would not suffer it to stand, as he said he knew the dangerous consequence, and that it was not enough for the trustee to say *you cannot prove any fraud*, for it is in his own power to conceal it. He, therefore, ordered the creditors to elect, whether they would abide by the purchase; and declared, that if a majority elected not to abide by it, he would order a resale by the master.

[ \* 259 ]

This case corrects the inaccurate *dictum* in the preceding one, that a sale at auction took away the objection, and it lays down the rule, and the remedy, in clear and precise terms. The only thing to be objected to in the report of the case is, that the remedy should be made to depend upon the will of a majority of the *cestui que trusts*; for this is not only questioned in the later cases, but seems contrary to the

1816.

DAVOUX  
v.  
FANNING.

[ \* 260 ]

settled rights of parties, for one *cestui que trust* has no power to control or give away the right of another.

The case of *Fox v. Mackreth*, which arose before Lord *Thurlow*, in 1788, (2 *Bro.* 400. 6 *Vesey*, 627. 9 *Vesey*, 247.) and underwent long and great discussion, is important only to show the solidity and value of the principle, that a trustee cannot be permitted to purchase, even of his adult *cestui que trust*, unless he has first fairly discharged himself from his office of trustee, and placed himself \*in circumstances to make a fair contract. This is the same doctrine which had been intimated by Lord *Hardwicke*, in *Ayliffe v. Murray*. (2 *Atk.* 59.) But in *Whichcote v. Lawrence*, (3 *Vesey*, 740.) Lord *Rosslyn* seems to have spoken with a carelessness and latitude of expression, which has given occasion to much criticism in the subsequent cases. An estate was conveyed to trustees, to sell for the benefit of creditors; the estate was put up at auction, and the defendant (one of the trustees) purchased two lots, for which he received deeds from the other trustees, and he afterwards resold his lots at a profit. The bill was by three only of the numerous creditors, praying that this trustee might account for the profit he had so made, and it was so decreed, with costs. It is to be observed, that relief was here granted to a minority of the creditors, and it is not the decree, but the observations of the chancellor, that are deemed inaccurate. He said the trustee had here made a profit, and he did not recollect a case, in which the mere abstract rule came distinctly to be tried, abstracted from the consideration of advantage made by the purchaser. That the proposition was not true, that where the trustee to sell was the purchaser, the sale was, *ipso jure*, null. That the real sense of the proposition was, that the trustee to sell should not gain any *advantage* by being himself the person to buy. That he is not to be permitted to gain profit by the execution of the trust; that unless the advantage be made, the purchase will never be questioned, and that it was not true as a naked proposition, that a trustee cannot buy of his *cestui que trust*.

The objection to most of these observations is, that they do not place the question on the true principle. However innocent the purchase may be in the given case, it is *poisonous in its consequences*. The *cestui que trust* is not bound to prove, nor is the Court bound to judge, that the trustee has made a bargain advantageous to himself. The fact \*may be so, and yet the party not have it in his power, distinctly and clearly, to show it. There may be fraud, as Lord *Hardwicke* observed, and the party not able to prove it. It is to guard against this uncertainty and *hazard* of

[ \* 261 ]

abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale. This is a remedy which goes deep, and touches the very root of the evil. It is one which appears to me, from the cases which have been already cited, and from those which are to follow, to be most conclusively established.

In *Campbell v. Walker*, (5 *Vesey*, 678. 13 *Vesey*, 600.) Lord *Alvanley*, then master of the rolls, declared, that the rule necessarily existed to this extent. That was a devise of real estate to the trustees to sell. They sold at auction, and bought in a part for themselves, at a fair price. There was no proof that the purchase was at an undervalue, or that the sale was not *bona fide* and regular. The bill was in behalf of residuary legatees, then infants, to have the sale set aside, and the lands resold. It was accordingly so decreed; and the master of the rolls said, that the rule did go to the extent, that the *cestui que trust* had a right to set aside the purchase, and have the estate resold, if he chose to say, in any reasonable time, that he was not satisfied with it. The trustee purchases subject to that equity. He buys with that clog. The only way for a trustee to purchase safely, if he is willing to give as much as any one else, is by filing a bill, and saying, so much is bid, and I will bid more, and the Court will then examine into the case, and judge whether it be advisable to let the trustee bid. In that way the Court will divest him of his character of trustee, and prevent all the consequences of his acting both for himself and for the *cestui que trust*. In no other way, as he observed, could the trustee become the purchaser, without being liable to be \*called upon to give up his purchase. It is impossible to know whether any advantage has been gained by the purchase, or whether the trustee did all he ought to have done. In that very case, he still retained the land, the defendants were still trustees, and if the plaintiffs elected to have the premises resold, they must be resold.

When this cause was, afterwards, brought before Lord *Eldon*, on the master's report of the sale, the infants recovered their costs; and he observed, that a trustee for sale could not contract with the *cestui que trust*, until he had distinctly and honestly removed himself from the relation of trustee, which could not have been done, in that case, as the *cestui que trusts* were infants. He said that a sale by auction made no solid difference, as the auctioneer was an agent employed by the vendor.

It appears to me, that the observations of Lord *Alvanley*, in the above case, illustrate the true rule and the reason of

1816.

DAVOUE  
V.  
FARMING.

[ \*262 ]

1816.

DAVOUX  
V.  
FANNING.

t, in a forcible and perspicuous manner; yet it would seem that he acted in direct contradiction to his own opinion, for he first directed an inquiry, by a master, whether a resale would be for the benefit of the infants. This was shaking the principle itself. There was hazard in the inquiry, and it was far from checking such sales. Lord *Eldon* expressed his disapprobation of the inquiry; and it was certainly an instance of surprising inconsistency between the reasoning and the conclusion.

Lord *Rosslyn*, in the case *ex parte Reynolds*, (5 *Vesey*, 707.) seemed to adopt the true rule, that a trustee cannot purchase without being exposed to a resale. In that case, the assignee of a bankrupt purchased at auction the estate of the bankrupt, under the commission, and the chancellor ordered the estate to be set up again, and that if it did not sell for more than he gave, the purchase was to stand.

[\* 263]

I proceed next to the decisions by Lord *Eldon*, which are uniform in support and vindication of the rule. They \*leave no possible doubt on the subject. Thus, in the case *ex parte Lacey*, (6 *Vesey*, 625.) the assignee of a bankrupt was purchaser of part of his estate, and the chancellor declared, that when a trustee undertakes to manage for others, he undertakes not to manage for his own benefit; that he cannot buy until, by a new contract with his *cestui que trust*, he has stripped himself of his character of trustee; but even this new contract is watched with infinite and the most guarded jealousy, because he may have acquired information, as trustee, which the Court cannot be certain he has communicated to the *cestui que trust*. He disavows the interpretation of Lord *Rosslyn*, that the trustee must make advantage. Whether he makes advantage or not, if the connection does not satisfactorily appear to be dissolved, it is in the choice of the *cestui que trust*, whether or not he will take back the property. The ground of the rule is, that though you may see, in a particular case, that he has not made advantage, it is impossible to examine sufficiently, in ninety-nine cases out of a hundred, whether he has made advantage or not.

In this case, another sale was ordered, and the premises were directed to be put up at the price the assignee gave, and if no more was bid, the purchase was to stand.

In another case, (*ex parte Hughes*, 6 *Vesey*, 617.) Lord *Eldon* thought, that a creditor of the bankrupt, or any agent of the sale, was within the reason of the rule, and could not be permitted to bid; and in this case he ordered the property to be set up for resale, at the price the creditor gave, together with the amount of his *bona fide* and substantial improvements, which were to be allowed him, and that if the

property sold for more, he should be paid for his improvements out of the purchase money, and if not, that he should be held to his purchase. This rule of setting aside the purchase by the trustee, at the option of the *cestui que trust*, and of directing a resale, upon the condition that the property produces a better \*price, was afterwards adopted by Sir Wm. Grant, in *Lester v. Lester*, (6 *Vesey*, 631.) and he said the rule was so established in Lord Thurlow's time.

The case *ex parte James*, (8 *Vesey*, 337.) contains a still further illustration and confirmation of the rule. It was there applied to a purchase, at auction, by a solicitor to the bankrupt commission, who was considered, as well as the assignees, to come within the mischief to be prevented; and he explicitly declared, that he did not proceed upon the ground of undervalue or want of fairness in the purchase, but upon the general principle. This case is deserving of notice, in another respect, for it may be considered as overruling the *dictum* or decision of Lord Hardwicke, that a majority of the *cestui que trusts* was sufficient to ratify the purchase of the trustee; for Lord Eldon declared, that the solicitor was not entitled to hold the land against the consent of any of these persons entitled to the surplus of the estate. He had said, also, in another place, (6 *Vesey*, 625.) that he held that opinion of Lord Hardwicke to be erroneous.

In the case *ex parte Bennett*, (10 *Vesey*, 385.) Lord Eldon went again, and at large, into the policy, the necessity, and the authority of the principle which we are considering. I need not repeat the argument, though I think that, in that case, he dwelt upon the subject with uncommon interest and vigor of decision. He applied the rule once more to a solicitor to a commission of bankruptcy, and to the commissioner purchasing for himself or for another. To permit either to bid, would be applying the information acquired by their trust to their own benefit. He said it was settled, that it was not requisite to show that the trustee had made any advantage by the purchase. If a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise; and yet the power of the Court would not be equal to detect the deception. \*Human infirmity will rarely permit a man to exert against himself that providence which a vendor ought to exert, in order to sell the estate most advantageously for the *cestui que trusts*, and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price. If the trustee cannot bid for himself, he cannot, on the same principle, bid for another. The distinction of its being a weaker temptation, is too thin to form a safe rule of justice.

1816.

DAVOUE  
V.  
FANNING.

[\* 264]

[\* 265]

1816.

DAVOUX  
v.  
FANNING.

The decree there was, also, that the expense of the lasting repairs and substantial improvements, made subsequent to the purchase, should be added to the purchase money, and the estate put up again at the accumulated sum.

In *Randall v. Erington*, (10 *Vesey*, 423.) the sale was fair, and the purchase by the trustee, at auction, for a full price; but he had subsequently sold a part, at some profit, and the Court opened the sale at the request of the *cestui que trust*, as to the parts not sold, and held the trustee to account for the profit on the part he had sold.

It remains only to observe, that during the time that Lord *Erskine* presided in the Court of Chancery, he gave the most unequivocal sanction to these doctrines, and declared that they were founded on the clearest principles of equity, and the general security of contracts. (*Morse v. Royal*, 13 *Vesey*, 355. *Lowther v. Lowther*, 12 *Vesey*, 95.) He went so far as to say, that there was so much difficulty in supporting a purchase by a trustee, even from his *cestui que trust*, and it required to be guarded with so much jealousy, that it would have been better to have interdicted it altogether. Indeed, no person could have expressed himself in stronger language, as to the delicacy and danger of such purchases, than Lord *Eldon* himself did on repeated occasions. (*Coles v. Trecothick*, 9 *Vesey*, 234. *Ex parte Bennett*, 10 *Vesey*, 385.)

[ \* 266 ]

It is proper to observe here, that this whole chancery doctrine has received the entire approbation and sanction of the Supreme Court of *Pennsylvania*. (3 *Binney*, 54. 4 *Binney*, 43.) Those decisions come with the more force, and are the more applicable as authority, when we consider that the Court is obliged, from the necessity of the case, (as they have no chancery tribunal,) to study, adopt, and apply equity principles more freely, and more liberally, than is usual in Courts of law.

The same doctrine has, also, been recognized in our own Courts. The Supreme Court, in *Jackson v. Van Dalfsen*, (5 *Johns. Rep.* 43.) admit it to be a well-settled rule in equity, that a trustee, or agent to sell, shall not, himself, become the purchaser; and they very properly refer the remedy of the *cestui que trust* in such cases to the cognizance of chancery. The doctrine underwent much discussion in this Court, and finally in the Court of Appeals, in *Munro and others v. Allaire*. (2 *Caines's Cases in Error*, 183.) *Allaire* was one of the executors of *Benjamin Palmer*, deceased, with power to sell the real estate, and he purchased of *Mary Palmer*, the widow and devisee, and, also, one of the executors, her right in the whole estate. She, subsequently to this purchase, conveyed her right to *Munro* and *Sniffin*, and a bill was filed by *Allaire* for a specific performance of

his agreement with *Mary Palmer*, and for a more perfect assurance and conveyance of her right. The purchase was charged to have been fairly made, after long consultation, in which she was assisted by a friend; and that *Allaire* gave a full price, and more than had been previously offered by another. To this bill *Mary Palmer* filed a demurrer, which was overruled in this Court, and she was ordered to answer. From this decretal order an appeal was brought, and the decree, overruling the demurrer, was reversed in the Court of Appeals, in 1796.

1816.

DAVOUR  
V.  
FANNING.

This decree of the Court, in the last resort, assumed the doctrine of the general disability of the trustee to purchase from the *cestui que trust*. It was not intended to be understood, I presume, of an absolute, unqualified disability, \*such as Lord *Erskine* was willing to adopt; for there were circumstances relied upon, in this case, to show that neither *Mary Palmer*, or her friends, were acquainted with the nature or extent of the rights she undertook to convey. The case may, therefore, be considered as establishing only the general doctrine in *Fox v. Mackreth*, and in the other cases which I have noticed. But I allude to the case as containing a full recognition of the general rule, that a trustee to sell cannot, himself, purchase. The only opinion given in the Court of Errors, (at least, the only one published,) is that of Mr. Justice *Benson*, in which the rule is laid down in these broad and general terms: "It is a principle," he says, "that a trustee can never be a purchaser; and I assume it as not requiring proof, that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue, if trustees might themselves become purchasers, or if they were not, in every respect, kept within compass. Although it may, however, seem hard that the trustee should be the only person of all mankind who may not purchase, yet, for very obvious consequences, it is proper the rule should be strictly pursued, and not in the least relaxed."

[ \* 267 ]

We cannot but notice the precision and accuracy with which the rule, and the reason of it, are here stated; but the rule appears to be much weakened in the subsequent part of the opinion.

He makes a distinction to show that the rule, thus laid down, is not to be understood in an absolute, unqualified sense. A trustee, it is said, is never to be assisted in this Court, by giving effect to such a purchase; but it does not follow that chancery is bound, in every case, and of course, to annul such a purchase, on the application of the *cestui que trust*. His words are, "That it is not, in every instance, in-



1816.

DAVOUE  
V.  
FANNING.

dispensable that all the *cestui que trusts* should \*agree to waive the implied fraud; it may be sufficient for a majority, or such other number, or proportion of them, to agree, as that, according to the circumstances of the case, it may be presumed there was no fraud in fact."

It appears to me, with great submission, that the learned judge has, in these observations, wounded the true principle which he had before so clearly declared. I presume he was misled by the case of *Welpdale v. Cookson*, in which Lord *Hardwicke* held that a majority of the *cestui que trusts* were sufficient to establish the purchase, whether the minority were consenting or not, and which case has been repeatedly questioned, and, in practice, overruled. But this is not all. He seems to think the Court are only to be satisfied that there was no *fraud in fact*, whereas it has been, again and again, decided, and the principle pervades the whole body of the cases, that the inquiry is not whether there was, or was not, fraud in fact. The purchase is to be set aside, at the instance of the *cestui que trust*, and a resale ordered, without weighing the presumption of fraud, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the Court.

In addition to these cases in our own Courts, I may refer to the statute which prohibits a sheriff, or other officer to whom an execution is directed, from purchasing at the sale under it. This is in affirmance of the same general rule; and the other statute, which allows a mortgagee, selling under a power, to purchase in the land, provided the sale be, in every other respect, regular and fair, does, by that very exception, recognize the existence of the rule in all other cases.

There is one case more on this subject too important to be omitted; that of *The York Buildings Company v. Mackenzie*, which was decided in the *English* house of lords in 1795, on appeal from the Court of Sessions in *Scotland*. (9 *Bro. P. C.* by *Tomlins*. App.)

[ \* 269 ]

\*That case is a complete vindication of the doctrine I am now to apply; and, considering the eminent character of the counsel† who were concerned, and who have since filled the highest judicial stations, and the ability and learning which they displayed in the discussion, it is, perhaps, one of the most interesting cases, on a mere technical rule of law, that is to be met with in the annals of our jurisprudence.

The appellants were an insolvent company, and their estates were sold by order of the Court of Sessions, at a public judicial sale, to satisfy creditors. The course at such sales is to set up the property at a value fixed upon by the Court, which is called the *upset price*, and which is founded

† For the appellants, *J. Mansfield*, *J. Mackintosh*, *R. Dundas*; for respondent, *J. Scott*, *Wm. Grant*, *Adam*.

1816.


 DAVOUR  
V.  
FANNING.

on information procured by the *common agent* of the Court, who has the management of all the out-door business of a cause. The respondent here was the common agent in that cause, and he purchased for himself, at the upset price, no person appearing to bid more, and the sale was confirmed by the Court; and in the course of eleven years' possession, he had expended large sums for building and improvements. There was no question as to the fairness and integrity of the purchase. But the object of the appellant was to set aside the sale, and have the estates sold anew, on the ground that the respondent, being the common agent in Court, in behalf of all parties, to procure information and attend the sale, was in the nature of a trustee, and so disabled to purchase.

The reasons of the house of lords for setting aside the sale are not given, and we are not left to infer them from the argument upon which the appeal was founded.

The appellants contended, that the common agent was under a disability to purchase, arising from his office; that the rule was founded in reason and nature, and prevailed wherever any well-regulated administration of justice was known; that the disability rested on the principle which dictated that a person cannot be both judge and party, \*and serve two masters; that he who is intrusted with the interest of others, cannot be allowed to make the business an object to himself, because, from the frailty of nature, one who has power will be too readily seized with the inclination to serve his own interest at the expense of those for whom he is intrusted; that the danger of temptation does, out of the mere necessity of the case, work a disqualification; nothing less than incapacity being able to shut the door against temptation, where the danger is imminent, and the security against discovery great; that the wise policy of the law had, therefore, put the sting of disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation; that the parts which the buyer and seller have to act, stand in direct opposition to each other in point of interest; and this conflict of interest is the rock, for shunning which the disability has obtained its force, by making that person, who has the one part intrusted to him, incapable of acting on the other side.

Several cases were referred to in the civil law, showing clearly, that the same principle had a deep and firm foundation in that system, and was most extensively applied, as for instance, to guardians, tutors, curators, procurators, judicial officers, and all other persons who, in any respect, as agents, had a concern in the disposition and sale of the property of others, whether the sale was public or private, judicial or otherwise. The passages to this purpose are to

[ \* 270 ]

1816.

DAVOUE  
v.  
FANNING.

be found in the *Digest*, lib. 18. tit. 1. ch. 34. s. 7. and lib. 18. tit. 1. ch. 46. and in lib. 26. tit. 8. ch. 5. sec. 2.

The counsel for the respondent admitted the general principle, and contented themselves with denying its application, holding that the common agent was not to be considered, in that case, and in respect of that sale, in the character of seller or trustee.

[\* 271 ]

But the house of lords thought otherwise, and set aside the sale, ordering the purchaser to account for the \*rents and occupation in the mean time, with a liberal allowance to him for his permanent improvements. This decision certainly carried the doctrine to its full extent, and it may be considered as a high and authoritative sanction given to the reasoning which accompanied the appeal.

I shall, accordingly, set aside this sale, upon the usual terms.

The following decree was entered :

" This cause being admitted by the counsel for the respective parties, upon the bill and answer, and the same being duly considered, and it appearing to the Court, that though the said *Henry Fanning*, as sole acting executor, &c., had authority, under the will, to sell the lot of land in the pleadings mentioned, to raise the legacy due to his wife ; yet inasmuch as he caused the said lot, on such sale, to be purchased in for the benefit of his wife exclusively, it is ordered, &c., that the said sale to the defendant *Hedden*, in trust for the wife of the defendant *Fanning*, be set aside, and vacated, upon the following conditions, viz. : that the said lot be re-exposed to sale, at public auction, by the defendant *Henry Fanning*, with the concurrence and agency of one of the masters of this Court, on giving four weeks' notice of the time and place of sale, in two of the daily papers printed in the city of *New-York*. That the said lot be put up at the sum of 9,600 dollars, being the amount of the former sale, together with the principal and interest of the mortgage since charged thereon, and of the debts incurred for substantial improvements, and if the said lot, with the improvements thereon, shall not sell for more than the said sum of 9,600 dollars, the sale heretofore made shall, in all respects, stand confirmed ; but if the said lot shall sell beyond that sum, then the former sale shall be held to be vacated, and the defendant *Henry Fanning*, as acting executor aforesaid, together with the said master, shall execute a deed in fee to the purchaser, \*on receiving the consideration money, which moneys shall be received by the said master, and forthwith thereafter brought into Court, to be subject to its further disposition ; and the question of costs, and all further questions, are, in the mean time, reserved."

[\* 272 ]

1816.

VAN BERGEN  
v.  
VAN BERGEN.

A. VAN BERGEN *against* H. VAN BERGEN.

This Court has jurisdiction in the case of a private nuisance, but will not give an order to abate the nuisance, until the opposite party has been heard.

THE bill stated, that the plaintiff was seised, in common with the defendant, of  $6\frac{1}{2}$  acres of land, with two falls mill-seats thereon, and a grist-mill also, on *Coxsackie* creek. That on the 8th of *December*, 1808, he agreed with the defendant for a *partition*, which was made, and the west half of the land, with the upper fall and mill-seat, were set off to the plaintiff, and the residue, with one fall and mill-seat, and the mill, set off to the defendant. That the parties released to each other, &c. That in 1809 the plaintiff erected a saw-mill on his upper part, with a dam. That he has rebuilt a dam 22 feet lower down, as the former dam overflowed other lands, and a recovery at law was had against him.† That the defendant has erected a dam  $3\frac{1}{2}$  feet high on the upper part of the fall contiguous to his mill, and caused the water to flow back, to the obstruction of the plaintiff's mill. That the fall on which such dam is erected is 20 feet high, and the depth of water at, and just above the fall, is from 10 to 14 feet, and sufficient to supply the defendant with water at all times, without such dam. That the dam of the defendant was erected \*before the plaintiff removed his dam, but with knowledge of the recovery, and of the intention of the plaintiff to remove his dam. That the injury by such dam will be *permanent*, and not to be recompensed at law, without numerous lawsuits.

*December 5th.*

† *Vandenberg*  
v. *Van Bergen*,  
13 *Johns. Rep.*  
241.

[ \* 273 ]

The bill prayed for an order on the defendant to take down his dam within a convenient time, and an injunction to desist from obstructing the creek, by erecting dams, &c., so as to impede the operations of the plaintiff's mill.

The deed of release from the defendant, which was annexed to the bill, conveyed the water-fall in the creek on the plaintiff's land, and the privilege of the water in the creek, and the free use of any mills to be erected on the creek and fall of water, so that the grantor shall not raise the mill-dam now erected below the said falls, so as to make back-water, to impede any mill to be erected by the grantee, &c.

*Van Vechten*, for the plaintiff, moved for an order agreeably to the prayer of the bill, which was sworn to and filed.

1816.  
 EXECUTORS OF  
 GETMAN  
 V.  
 BEARDSLEY.

THE CHANCELLOR. I have no doubt of the jurisdiction of the Court in cases of private nuisance. It can order them to be abated, as well as restrain them from being erected. (*Coulson v. White*, 3 *Atk.* 21. *East India Co. v. Vincent*, 2 *Atk.* 83.) But this is not to be done until the opposite party has been heard. Lord *Hardwicke* said, in the case of *Ryder v. Bentham*, (1 *Vesey*, 543.) that the Court never makes an order, on motion, to pull down any thing, though it will, sometimes, on motion, order a thing going on to be stayed.

Motion denied.

[\*274]

\*EXECUTORS OF GETMAN *against* BEARDSLEY.

Where a bill is filed to correct an alleged mistake in a contract or agreement, the evidence of the mistake must be clear and certain. The bill, being filed solely to correct a mistake in the contract, will not be retained on the ground that there is money due on the contract from the defendant.

Costs in this Court are discretionary; and if executors, administrators, or heirs, bring groundless and vexatious suits, they will be ordered to pay costs.

December 9th.

THE bill was filed to correct a mistake charged to have arisen in drawing an agreement between testator and defendant, respecting the payment of certain moneys by the defendant to *Dirick Van Schelluyne*, for and on behalf of the testator. The mistake charged was, that in the agreement that the defendant should pay to the said *Dirick* 3,000 dollars by such a day, and the further sum of 5,250 dollars, in two equal annual payments, the words *with the interest thereon*, &c., were omitted to be added to the last sum.

The mistake was denied in the answer, and proof taken on both sides.

Among other things in the answer, to show there was no such mistake, or, if any, that it was subsequently waived, the defendant stated that, a dispute arising between him and the testator on the subject of this mistake, he refused to make any payments to *Van Schelluyne*, unless he received an indemnity against any sum due to *Van Schelluyne* beyond the sums stipulated by his contract; and accordingly the testator procured a covenant, executed by *Nathan Christy*

and *Frederick Getman, jun.*, two of the present plaintiffs, by which they covenanted with the defendant, that after the payments by him to *Dirick Van Schelluyne* of the sums mentioned in the contract between the defendant and testator, of the 24th of November, 1809, to be paid by the defendant to *Van Schelluyne*, if any money \*should still be due from the testator to *Van Schelluyne*, they would pay the same. *Frederick Getman, jun.* was a subscribing witness to the agreement between the testator and the defendant.

1816.

EXECUTORS OF  
GETMAN  
V.  
BEARDSLEY.

[\* 275]

*Cady*, for the plaintiffs.

*Henry*, for the defendant.

THE CHANCELLOR. There is no clear and certain evidence of any such mistake as is charged in the bill. The weight of evidence is decidedly the other way. The bill must, accordingly, be dismissed. It cannot be retained on the ground that the instalments paid by the defendant to *Van Schelluyne*, were not paid at the times stipulated, and, therefore, intervening interest is due. The bill was brought to correct an alleged mistake, and nothing else, and if any such interest is due, (and the better opinion is that there is none,) the party's remedy was clear and perfect at law. The only difficulty in the case is, whether the bill shall be dismissed with or without costs.

Ordinarily, executors and other trustees do not pay costs, unless guilty of misbehavior, or some wilful default. They are not supposed to know, as plaintiffs, the imbecility of their own suit. This is the reason of the rule at law. (3 *Bos. & Pull.* 117, 118.) But in this Court, where costs are discretionary, the rule seems to depend more on the particular circumstances of each case. Where the heir brings, in that capacity, a groundless or vexatious suit, the Court will make him pay costs, though he may be, as heir, tenderly regarded by the Court. (3 *P. Wms.* 373. 2 *Atk.* 424. 3 *Bro.* 214.) In this case, the suit is substantially for the benefit of two of the executors, for they have covenanted to indemnify the defendant against any payments to *Van Schelluyne*, beyond the sums mentioned in the agreement; and in proportion as that agreement can be extended, the \*extent of their covenant will be diminished. Nor can they be said to have brought the suit ignorant of the testator's rights. They knew of this controversy before his death; one of them was a witness to the instrument in dispute, and two of them had, in behalf of the testator, afterwards ratified and confirmed it, as it stood, and with an express view of closing the question.

[\* 276]

1816.

SHEPARD  
V.  
MERRILL.

Under these circumstances, I think the bill ought to be dismissed with costs, *de bonis testatoris, si non, de bonis propriis*. I have charged the costs on the assets, in the first place, because it appears that the testator had himself filed a bill on the same ground with the present one, and which was abated by his death.

Decree accordingly.

### SHEPARD *against* MERRILL and TUCKER.

In the case of an *award*, this Court will not interfere, unless there has been fraud, imposition, or mistake.

Where the matter submitted was, what damages the one party or the other was to pay on the *surrender* of a lease, and the arbitrators awarded a sum to be paid by the lessor to the lessee, but did not take into consideration the rent payable at the next quarter-day, considering that matter as not in controversy or submitted; nor was it mentioned or brought before them by the parties; it was held that there was no mistake in the award.

December 16th.

[ \* 277 ]

THE bill stated, that the plaintiff, on the 12th of *March*, 1814, demised to the defendants a farm of 150 acres, with certain furniture, stock, and farming utensils thereon, for the term of *four* years, commencing *May* 1st, 1814, at the yearly rent of 600 dollars, payable quarterly. That differences having arisen, afterwards, between the parties, on the subject of the lease, they, on the 18th of *April*, \*1815, by an agreement under their hands and seal, in order to settle their dispute, and to rescind the lease, submitted the same to arbitration. This agreement was as follows:—"It is hereby agreed, that the lease executed on the 12th of *March*, 1814, of the farm, and also the agreement relative to the furniture, stock, and other articles on the farm, be vacated, relinquished, given up, and surrendered." "That the defendants return to the plaintiff, forthwith, the said articles, and that *George Doolittle*, and *Job Phelps*, being two indifferent men, mutually agreed on to adjudge, &c. on all matters in difference which have arisen, or may arise, relative to the said agreement, and the relinquishment thereof, and the fulfilment of the above agreement to redeliver the same, according to the agreement of the 12th of *March*, 1814." "That the arbitrators above named, and *Gerrit G. Lansing*, shall decide whether any, and what sum

218

of money, shall be paid by the defendants to the plaintiff, for the relinquishment and surrender of the said lease and agreement, and what sums the plaintiff shall pay to the defendants for the surrender and relinquishment, and giving up the said lease and agreement." "That the award be made in two days, and be binding, &c. Possession of the premises to be given on the 1st of *May*, then next, and the articles and stock aforesaid, to be kept by the defendants until the 1st of *May*, and then surrendered up."

By the *award* of the three arbitrators, dated *April* 18th, 1815, it was awarded, that for the relinquishment, surrender, and giving up of the lease and agreement, the plaintiff should pay to the defendants 199 dollars and 50 cents, and that the defendants forthwith deliver up the articles mentioned in the schedule, &c., and deduct from the payment to be made by the plaintiff, 49 dollars and 50 cents, the difference in the appraisement of the cattle between *March* 18th, 1814, and that day, and shall leave two and a half tons of hay in the barn, for the use of the plaintiff.

\*The plaintiff charged in his bill, that the arbitrators, by their award, did not intend to extinguish the quarter's rent to become due on the 1st of *May* then next ensuing the date of the award, nor did they allow the plaintiff for that quarter's rent, being 150 dollars, nor deduct the same from the sum awarded to the defendants, nor was that rent in controversy, but was considered as a distinct demand, not then due, but payable on the *May* ensuing, when it should satisfy so much of the sum awarded; and that the defendants, when the award was made, admitted that the rent of 150 dollars would be due on the 1st of *May*, and all demands between the parties would be then balanced. That though the plaintiff was ready and willing to set off the said rent against the sum awarded to the defendants, yet they refused to allow the same; and to defraud the plaintiff, had brought an action at law on the award in the Court of Common Pleas of *Oneida* county, and were proceeding to obtain judgment, under a pretence that the submission and award have deprived the plaintiff of his right to a recovery of the rent, though the arbitrators intended to make no such decision, but the contrary. The bill prayed for an injunction to stay the suit on the award, &c., which was granted.

The *answer* of the defendants admitted the lease, &c., and the submission and award. They alleged, that the plaintiff took possession of the farm before the first of *May*, 1815, and received articles of property before that time. That they intended to submit the amount of damages either might sustain, &c., by the surrender, with reference solely to the future continuance of the lease, without

1816.

SHEPARD  
V.  
MERRILL.

[ \* 278 ]



1816.

SHEPARD  
V.  
MERRILL.

[\* 279 ]

regard to any rent to become due, or any other claim of the plaintiff for the use of the premises since the last quarter-day, or otherwise ; and that nothing was said about the claim for rent, until after the award was delivered ; and that since the award, they have never admitted, or intended to admit, that they were to pay the said \*rent, or that the same was to be deducted from the amount awarded to them, or that nothing would be due to them on the first of *May*. That they performed the award on their part, and the plaintiff refusing to pay, &c., they brought a suit on the award, &c.

The arbitrators, who were examined as witnesses, stated, that nothing was said to them about the quarter's rent, to become due on the first of *May* ; nor did they take it into consideration, but supposed it would be collected when it became due, and was not a matter of controversy between the parties. One of them stated, that after the award was published, the plaintiff said they had made the matter even, as the amount of the award would balance the quarter's rent, to which *Tucker*, who was present, made no reply, except, that he was always satisfied the arbitrators would do justice.

Two other witnesses testified to a conversation after the award, in which the defendants said, the sum awarded would balance the rent.

*Gold*, for the plaintiff.

*Storrs*, contra.

THE CHANCELLOR. There is no ground stated, and proved, for the interference of this Court. The question of rent was not submitted. This is admitted by the bill and answer. Whether the rent had been liquidated up to the day of the surrender and submission, and paid, or otherwise settled, or whether it was due or not, or would be due and payable on the first of *May*, were questions not within the submission, and they did not enter into the consideration of the arbitrators, or into their award. There is then no mistake in the award, either alleged or proved, and, consequently, no ground for the bill. The defendants ought to be permitted to go on with their action at law upon the \*award. Whether the plaintiff has matter for a valid set-off to the demand at law, is not for me to determine in this suit. If he has any rent due, he can set it off. His difficulty arises, as I apprehend, from the contract of the 18th of *April*, 1815, by which it is agreed, that the lease be absolutely vacated and surrendered, and the articles of stock and furniture on the farm forthwith returned. This surrender did, probably, in judgment of law, extinguish the

[\* 280]

growing rent; (*Bain v. Clark*, 10 *Johns. Rep.* 424.) and unless it be charged and shown, that this contract, in that part of it, was founded in fraud, imposition, or mistake, there can be no relief here. It is sufficient, however, to say, that the bill is not founded on any such allegation. The true point submitted, was the sum that the one party or the other was to pay for being delivered, by the surrender, from a good or bad bargain, as it respected *the whole term*; without reference to the question, whether the surrender, *in presenti*, extinguished the rent growing, and not due when the lease was given up. This, I think, was the meaning of the articles of submission, and the parties certainly put that construction upon them, by not bringing the question of rent before the arbitrators. The arbitrators determined *secundum allegata*; and there can be no complaint of the award, because they did not investigate and decide a point not brought before them. It may well be that the plaintiff did not intend to extinguish the growing rent, by the acceptance of a surrender before the rent became due. He ought, then, to have raised that point before the arbitrators, or have come into this Court, on the ground of a mistake in the articles of the 18th of *April*, if he felt himself able to show it. As the case stands, I do not see how I can be authorized to set aside the award.

1816.

SHEPARD  
V.  
MERRILL.

Bill dismissed, with costs.

221

1816.

ELDRIDGE  
V.  
HILL.

\*ELDRIDGE *against* HILL and MURRAY.

A *Bill of Peace*, to prevent litigation at law, is allowed only in case the plaintiff has satisfactorily established his right at law, or where the persons who controvert the right are so numerous as to render an issue, under the direction of the Court, necessary to bring in all the parties concerned, and to prevent a multiplicity of suits.

December 30th.

THE bill stated, that the plaintiff is seized in fee of lot No. 13, in *Young's* patent, in *Sharon*, in *Schoharie* county, and that he, and those under whom he holds, have been in possession for upwards of twenty years. That the defendant *Hill* possesses lot No. 41, adjoining it, under the defendant *Murray*. That *Wm. Hovey*, who possessed lot No. 41, about six or seven years ago, erected a *carding machine*, within a few feet of the line between them. That an ancient stream runs through lot 41, to and through lot 13. That the machine was not placed on the stream, but at some distance, and the water from the stream conducted to the machine, by means of a *ditch*, and from it by a ditch dug to the lot 13, and into and through that lot until it came to a descent, so that the water would run off, without a ditch, into the natural channel. That the said ditch was so dug before the plaintiff purchased the lot of *Barnabas Le Grange*. That *Le Grange* never gave any license to make the ditch, nor is any such license set up by the defendants. That until the 9th of *July* last, the defendant has been in the quiet possession of the ditch, through the land of the plaintiff, as a water-course. That the plaintiff wishing to use the water, by a mill, and to cause it to flow back to his line, the defendant refused to fill up his ditch, and the plaintiff placed a partial obstruction in the ditch on his own land, about 1½ feet high, which forced the water back to the wheel of the machine. That he did this to give the \*defendant an opportunity to try his right; for if the plaintiff cannot fill up the ditch, nor flow the water into it, he cannot build a dam on his own land. That the defendant *Hill* sued the plaintiff for that obstruction, in the Supreme Court, and the cause is there at issue. That *Hill*, afterwards, commenced a suit before a justice of the peace for a *continuance* of the obstruction, and has sued the plaintiff every week since, before the same justice, for the same obstruction. That there have been commenced, in all, 15 or 20 suits, one of which was brought to trial on its merits, and a verdict given against the present plaintiff, who has sued out a *certiorari*, and had

[ \* 282 ]

the same allowed, for removing that judgment into the Supreme Court. That the defendant *H.* continues to commence suits weekly, and threatens to do so indefinitely.

The bill prayed for an *injunction* to restrain the defendant *H.* from further prosecuting the suits before the justice already pending, and from commencing any more, on account of the obstruction aforesaid, until the suit commenced by the defendant *Hill*, in the Supreme Court, be determined.

1816.

ELDRIDGE  
V.  
HILL.

*Seely*, for the plaintiff, moved for the injunction.

THE CHANCELLOR. A bill of peace, enjoining litigation at law, seems to have been allowed only in one of these two cases; either where the plaintiff has already, satisfactorily, established his right at law, or where the persons who controvert it are so numerous as to render an issue, under the direction of this Court, indispensable to embrace all the parties concerned, and to save multiplicity of suits. (*Lord Bath v. Sherwin*, 1 Bro. P. C. 266. *Ewelme v. Andover*. 1 Vern. 266. *Leighton v. Leighton*, 1 P. Wms. 671. *Trustees of Huntington v. Nicholl*, 3 Johns. Rep. 566. *Tenham v. Herbert*, 2 Atk. 483.) In the case in *Atkyns*, Lord Hardwicke refused to interfere between two individuals, until the right was first tried at law. In the present \*case, there had been but one trial at law, and that one was decided against the plaintiff. The controversy is between him and a single individual, and is pending for decision in the Supreme Court. If the defendant *Hill* continues to harass him with fresh suits at law, it is because a new cause of action (as he alleges) continues to arise daily, by the continuation of the nuisance. No case goes so far as to stop these continued suits between two single individuals, so long as the alleged cause of action is continued, and there has been no final or satisfactory trial and decision at law upon the merits.

[ \* 283 ]

Injunction denied.

1816.

HENDRICKS  
v.  
ROBINSON.

HENDRICKS *against* ROBINSON, FRANKLIN and others.

This Court lends its aid to a judgment creditor, by compelling a discovery and account, against a debtor or third person, who has possession of the debtor's property, and placed beyond the reach of the legal process; but the creditor, before he is entitled to such aid, must have sued out execution at law.

One creditor may file a bill in behalf of himself and all the other creditors; and where one judgment creditor filed a bill for himself alone, it was sustained, it not appearing that there were any other creditors; or if there were, there was reason to believe their judgments had been satisfied; or if not satisfied, they had not taken any steps at law to enforce payment by execution; and, at any rate, all parties concerned in such judgments were brought before the Court.

Conveyances by a debtor, of his real estate, declared fraudulent and void against his creditors, under the circumstances.

Assignments of personal property by a debtor, in insolvent circumstances, and who has stopped payment, to secure a particular creditor for existing claims and engagements, as well as for future advances and responsibilities, if made *bona fide*, and where there is no reason to doubt the honesty and fairness of the transaction, will be deemed valid.

A creditor, to whom his debtor has assigned property, as security for advances and responsibilities, with an agreement that if the property is not redeemed within a certain time, the assignee may sell it, to pay and indemnify himself, may, after the expiration of the time limited, sell the property for his indemnity; and may, with the assent of his debtor, become the purchaser thereof, and of the equitable or residuary interest of the debtor, at a fair and adequate valuation; and such purchase made *bona fide*, and without intent to injure or defraud creditors, will be valid, not only against the debtor, or *cestui que trust*, but against all other persons.

[ \* 284 ]

The mere equitable interest of a debtor, in personal property assigned by him as security, cannot be reached by process at law, or be bound by execution.

Suing out execution merely does not create a *lien* on goods and chattels; but there must be an actual levy of the execution to bar the subsequent *bona fide* sale. The property of the debtor, in goods and chattels, is not changed, until the execution is executed.

Where F., a debtor, in embarrassed circumstances, made an assignment (absolute on its face) of personal property to W., a creditor, as security for a new loan of money, and for existing claims, and also for his indemnity against existing and future engagements, especially all such as should arise in the management of the property assigned; W., for the purposes of the assignment, effected a loan of money from P., on condition of guarantying to him a debt due to him from F., to be paid out of the proceeds of the property so assigned; it was held that P., by lending his money to W. on this guaranty, acquired an equitable *lien* on, and was entitled to be paid his debt out of, the proceeds of the property in the hands of W., in preference to other creditors.

The assignee, under such an assignment, is entitled to his *commissions* on the sale of the property, according to the stipulation contained in the assignment, unless the allowance is so disproportionate and extravagant as to afford evidence of fraud.

1817.

HEBRICKS  
V.  
ROBINSON.  
January 30th.

THE bill was filed, on the 3d of June, 1809, by the plaintiff, (a judgment creditor of *Robinson & Franklins*,) against *William T. Robinson, Abraham Franklin, John Franklin, Henry Franklin, Matthew Franklin, Benjamin G. Minturn, John T. Champlin, Jacob Walden, and Thomas Walden*, and several others, as mortgagees, made parties, *pro forma*.

Prior to the year 1807, *Samuel Franklin*, (who died on the 4th of September, 1807,) *William T. Robinson*, and *Abraham Franklin*, were partners in trade, under the firm of *Franklin, Robinson & Co.* *John Franklin* was also concerned in trade.

*Samuel Franklin* was seised of a large real and personal estate, at the time of his decease, all which he devised to *William T. Robinson, Abraham Franklin, and John Franklin*; and, after the death of *S. F.*, they were jointly interested and concerned in all the commercial dealing, and business \*transacted under the firm of *Franklin, Robinson & Co.* or in the name of *John Franklin*.

[ \* 285 ]

In December, 1807, being much embarrassed, they borrowed of the banks 200,000 dollars, as a security for which they mortgaged real estate, to the value of 550,000 dollars, as stated in the bills and also gave the personal responsibility of several merchants, to the amount of the loan, among whom were the defendants, *Minturn & Champlin, Henry Franklin, Thomas Franklin, and J. & T. Walden*. These responsibilities were contingent, being only for any eventual deficiency in the mortgage security.

On the 30th of December, 1807, *Franklin, Robinson & Co.*, and *John Franklin*, stopped payment, and in January, 1808, the plaintiff commenced suits against them, as drawer and endorsers of bills of exchange, returned protested for no payment, and recovered judgments to the amount of 26,647 dollars and 48 cents.

The bill charged, that *W. T. Robinson, A. Franklin, and J. Franklin*, since they stopped payment, had fraudulently conveyed away their real and personal estate, in trust, without any valuable consideration, and with a view to defraud and defeat their creditors; and the conveyances and assignments alleged to be fraudulent were particularly specified by the plaintiff, who stated, also, that on the 6th of February, 1809, he issued execution on his judgments, obtained as above mentioned; but, by reason of the fraudulent transfers so made by *W. T. R., A. F., and J. F.*, he could obtain no satisfaction of his judgments, &c.

The bill prayed, that all the real and personal estate conveyed by *W. T. R., Abraham F., and John F.*, or either of them, since they stopped payment, to *Henry F. Minturn and*

1817.

HENDRICKS  
V.  
ROBINSON.

[ \* 286 ]

*Champlin*, and *J. & T. Walden*, or either of them, might be decreed to be applied to the payment of the plaintiff, free from all encumbrances, imposed since the same was so conveyed; and that all such grants, conveyances and assignments might be decreed to be cancelled; \*or that the plaintiff might be allowed to redeem the lands mortgaged to the banks, &c.; or that the same might be sold under a decree of the Court, and that after the mortgage debts were paid out of the proceeds, the residue might be applied to the payment of the plaintiff's debt.

After answers had been put in to the bill, the defendants, *William T. Robinson*, *Abraham Franklin*, *John Franklin*, and *Henry Franklin*, severally applied for and obtained their discharges under the insolvent act of this state, in 1811; and the plaintiff, accordingly, filed a *supplemental bill*, in *January*, 1813, against the defendants to the original bill, and the assignees of the defendants who had been discharged as insolvents. The supplemental bill stated, that *Abraham F.*, in his account to the judge, before whom the proceedings were had, relative to his discharge under the insolvent act, omitted to state a judgment of *John Movatt*, of the 6th of *May*, 1798, for 18,174 dollars and 56 cents; a judgment of *J. & N. Heard*, for 22,775 dollars and 38 cents, and a judgment of *W. G. Miller* and others, of the 8th of *May*, 1808, for 6,165 dollars and 9 cents, against *Robinson*, *Abraham F.* and *John F.*; and that *Abraham F.*, on his examination before the judge, declared that these judgments were satisfied by *Henry F.* with property delivered to him by *Abraham F.* and *John F.*, and which had not been noticed in their account with *Henry F.* That *Henry F.*, who obtained his discharge on the 30th of *December*, 1811, in the inventory of his estate exhibited to the judge, represented those three judgments as his property; and on his examination, stated, that *Abraham F.* and *John F.*, in *January*, 1808, delivered to him, *Henry F.*, several promissory notes drawn by *Thomas F.*, amounting to 40,000 dollars. That *Thomas F.* having possessed himself of the judgments above mentioned, the judgments and notes, by an agreement between *H. F.*, *T. F.*, *A. F.*, and *J. F.*, and *John Townsend*, were included in a settlement of accounts between *Franklin*, *Robinson & Co.*, *John Franklin*, and \**John Townsend*, and a balance stated against *J. Townsend*, which *Thomas F.* assumed to pay to *Henry F.*, and by him passed to the credit of *A. F.* and *J. F.*; and that those notes were delivered to him, *H. F.*, by *A. F.* and *J. F.*, and were not passed to their credit, or noticed in the books of *H. F.*, but were delivered by him to *Thomas F.*, who, in consideration thereof, assigned to him the judgments, and

[ \* 287 ]

which he, *H. F.*, considering them as in full force, had included in the assignment to his assignees; and the plaintiff charged this to be fraudulent as against him, &c.

The defendants, *Henry F.* and *Matthew F.*, in their answer, put in the 23d of *October*, 1809, stated, among other things, that *H. F.* was security for *Franklin & Robinson*, and *John F.*, to the banks, for 20,000 dollars; that when *Robinson & Franklin* stopped payment, *Henry F.* and *Matthew F.* were contingently responsible for them, to the amount of 120,000 dollars, and, being alarmed, applied to them for security; and, afterwards, in *January*, 1808, *A. F.* and *J. F.* offered their real estate as security, which was refused, under an expectation of obtaining personal security, of a more disposable nature. That it was agreed that *M. F.* should withdraw, and that *H. F.* should have the whole management of their mutual and copartnership concerns; that *William T. Robinson* having withdrawn from the concerns of *Robinson & Franklin*, *Henry F.* entered into an agreement with *Abraham F.* and *John F.*, for the purchase of all their real estate, including what was mortgaged to the banks, and what *W. T. R.* had released to them. That the lands were fairly valued at what they were deemed to be worth, which valuation was set forth in a schedule of the estate conveyed, annexed to the answer. That the consideration for the conveyance consisted of the claim of *Henry F.*, his notes and his engagements to pay certain confidential creditors of *Robinson & Franklin*. The deeds for the real estate were set forth in the answer, and the valuation, free from encumbrances, \*was 721,663 dollars; the mortgages specified, amounted to 289,674 dollars and 51 cents, of which amount 219,000 dollars was deducted, leaving 502,663 dollars as the consideration, and which included the sum of 70,764 dollars of the mortgages which *H. F.* assumed to pay off; the residue, being 431,805 dollars and 79 cents, was paid, in certain advances, responsibilities, and notes of *Henry F.*, which were specified in a schedule annexed to the answer, and which were also specified in the answer of *Robinson*, and *A. F.* and *J. F.* That *Henry F.* afterwards purchased of *Abraham F.* and *John F.* the residue or balance, whatever it might be, in the hands of *Minturn & Champlin*, to whom they had assigned certain vessels and cargoes, and received an order on *M. & C.* for that purpose, dated *April* 3d, 1808, and which was accepted by *M. & C.*; that this was a *bona fide* purchase on speculation, for which he, *H. F.*, gave to *A. F.* and *J. F.* his three several promissory notes for 15,000 dollars each; but this purchase was, afterwards, in *May* or *June*, 1809, rescinded by consent, and the notes given up. That on the 3d of *April*, 1808, he, *H. F.*, also purchased

1817.

HENDRICKS  
v.  
ROBINSON.

[\* 288]



1817.

HENDRICKS  
V.  
ROBINSON.

[ \* 289 ]

of *A. F.* and *J. F.* the balance to be coming to them from the proceeds of certain vessels and cargoes assigned by them to *J. & T. Walden*, and received an order on *J. & T. Walden* for that purpose, which they accepted on the 5th of *May*, 1808; that the consideration of this purchase, which was made on speculation, *bona fide*, was 21,000 dollars, for which he gave his three several notes to *A. F.* and *J. F.*, payable in one, two, and three years; that on the 27th of *April*, 1808, he, *H. F.*, received of *J. F.* four notes of *M. & C.*, at six months, which were regularly paid, the principal and interest of which amounted to 7,532 dollars. That he also received, in *February*, 1808, of *J. & E. Ferris*, on a transaction which was specified, 8,000 dollars, for which he was ready to account to *A. F.* and *J. F.*; and that in *June*, 1808, he received for them, of *N. Hawkshurst*, 851 dollars and 67 \*cents, for which he held himself accountable. That since *Robinson & Franklin* stopped payment, he, *H. F.*, had made advances for them, and given his notes, to the amount of 33,640 dollars and 59 cents, which were particularly set forth. *Henry F.* averred, that the conveyances made to him by *Abraham F.* and *John F.* were *bona fide*, and for an adequate consideration, &c.

The defendants, *William T. Robinson*, *Abraham F.*, and *John F.*, put in their answer, on the 10th of *January*, 1810; they admitted the conveyances and assignments made by them as stated by the plaintiff, but denied all fraud in the disposition of their property; and averred, that they sold their real and personal estate, *bona fide*, without fraud, and for a valuable and adequate consideration. They denied a fraudulent arrangement with *Henry F.*, or any other person, to protect their property; but stated that the conveyances of a principal part of the real estate were after the suits were commenced by the plaintiff, and before he had obtained judgments. That on the 10th of *January*, 1808, they sold and conveyed to *Henry F.*, lands in *Connecticut*, for 10,000 dollars, which sum was carried to his debit, as so much towards advances and responsibilities. They set forth, in a schedule, the real estate and its valuation, as stated by *Henry F.* in his answer; and they stated that the valuation was at the highest price for such lands, and more than could be obtained for them in cash, or on good security; and it was what they supposed the lands to be reasonably worth, free from encumbrances. That the consideration, after deducting the mortgages, consisted of 143,805 dollars and 29 cents, of advances, engagements and responsibilities of *Henry F.* and *Matthew F.*, according to an account presented by them, and believed to be correct; 221,782 dollars and 20 cents, in five notes of *Henry F.*, payable in one, two

three, four, and five years; and the residue in the undertaking of *Henry F.* to pay, in four years, certain confidential creditors of *Robinson & \*Franklins*, whose debts amounted to 66,400 dollars, who were named, and their debts specified, and who, they alleged, had notice of the arrangement. That these sums, with the encumbrances, made up the full amount of the valuation of the real estate, as set forth in the schedule; and they also set forth the advances and responsibilities of *Henry F.* and *Matthew F.* for them. They stated, that the notes given by *Henry F.* still remained in the hands of *A.* and *John F.*, unpaid. That the agreement and notes were without any condition, and the conveyances absolute and *bona fide*, and without any trust. That *H. F.* had received various sums, which they specified, amounting to 26,324 dollars and 5 cents, which was all the personal property that had been received by *Henry F.*, besides a note of *Thomas F.* for 9,508 dollars and 82 cents.

That in *January*, 1807, the defendants, *Robinson & Franklins*, and *Minturn & Champlin*, purchased the ship *Manhattan*, and fitted her out for a voyage to *Batavia*, on their joint account. That they and *M. & C.* borrowed of the United Insurance Company 80,000 dollars, by way of *respondentia* on the cargo of the ship, and gave their bond, dated the 5th of *January*, 1807. That *M. & C.* became largely responsible for the defendants, by endorsements, acceptances, lending notes, &c., and after the mortgage to the banks, applied to them, *R. A. F.* and *J. F.*, for security, and they, accordingly, executed to *M. & C.* two deeds of assignment, one on their half of the *Manhattan* and her cargo, and the other of the ship *Milwood* and her cargo, owned by the defendants, and of the policies of insurance thereon. The first assignment expressed, that the ship and cargo were to be held by *M. & C.* for their indemnity, subject to the *respondentia* bond; and each assignment contained a proviso, that if, at the expiration of three months after the arrival of the ships, the defendants should pay all the engagements which *M. & C.* had or might come under for them, or either of them, and all the debts due \*by them, or either of them, to *M. & C.*, and should indemnify *M. & C.* for all damages by reason of such engagements, then the assignments should be void; and in case of the failure of the defendants so to do, they gave authority to *M. & C.* to sell the ships and cargoes, &c., and apply the proceeds to their own payment and indemnity, after first satisfying the *respondentia* bond. That *M. & C.* accepted bills drawn on them by the supercargo, at *Batavia*, for the return cargoes, to the amount of 72,575 dollars and 50 cents. That the ships arrived at *New-York*, with their cargoes, and were entered by *M. & C.* at the custom-house,

1817.

HENDRICKS  
V.  
ROBINSON.

[ \* 290 ]

[ \* 291 ]

1817.

HENDRICKS  
V.  
ROBINSON.

as their own property; and they paid the duties and premiums of insurance, and also for the disbursements and expenses, the particular sums so paid being set forth in their answer. That the defendants *Robinson & Franklins* wholly failed to pay and indemnify *M. & C.*, according to the condition of the assignments, whereby they became absolute; but, on account of the embargo, *M. & C.* made no sales, and the cargoes were stored. That on the 24th of *March*, 1809, the defendants agreed with *M. & C.* that they might sell the *Manhattan* for 22,500 dollars, crediting the defendants with one half of the amount, and, in *April* following, they agreed that *M. & C.* might take to themselves the *Milwood* and her cargo, and their half of the cargo of the *Manhattan*, at certain prices mutually agreed upon, and the amount was passed to their credit with *M. & C.* That the prices so allowed by *M. & C.* the defendants believed to be the best that could be obtained.

[ \* 292 ]

These defendants further stated, that when they stopped payment, they owned three fourths of the ship *Savage*, and the whole of the ship *Huntress*, and the schooner *Hope*, the two latter vessels being expected on their return home. That wanting to provide money to meet the expenses of these voyages, and to obtain the necessary aid and credit, on their arrival, the defendants, in *January*, 1808, applied \*to *J. & T. Walden*, to whom they were already indebted, for an advance of 30,000 dollars; and it was agreed between them, that *J. & T. Walden* should advance that sum, and the defendants assign to them the above-mentioned vessels and their cargoes; that *J. & T. Walden* were to enter and pay the duties on the vessels and cargoes on their arrival, and sell them, on commission, to the best advantage, and to account for the proceeds, after deducting all advances, responsibilities, losses, commissions, &c. That *J. & T. Walden* were to hold these vessels and their cargoes, for their indemnity against all engagements and responsibilities, incurred for *Franklin, Robinson, H. & J. F.*, and for all expenses, &c. That the supposed amount of sales was estimated at 120,000 dollars, on which *J. & T. Walden* were to receive a commission of 5 per cent. on the net sales; and for advances, loans, and insurances, they were to charge such interest, commission, and premium, as they should be obliged to pay, and upon all other advances they were to be allowed lawful interest. That pursuant to this agreement, the defendants, on the 2d and 4th of *January*, 1808, executed conveyances of the property to *J. & T. Walden*. That the bills of sale were absolute on the face of them, but understood to be made for the purposes aforesaid, and they were so made *bona fide*, not with any view to defeat creditors, or for any

230

fraudulent purpose; and the defendants annexed to their answer an account current between them and *J. & T. Walden*, to the 31st of *December*, 1808.

The defendants *Minturn & Champlin* put in their answer on the 12th of *October*, 1809, to which were annexed schedules of their accounts and transactions with the *Franklins*; and after charging their advances and commission, according to the agreement with *Robinson & Franklins*, they made a balance of 359 dollars and 21 cents due to them from *Robinson & Franklins*. They stated their transactions with *R., A. F. & J. F.*, substantially, as set forth in the answers of the *Franklins*, and denied all fraud or collusion, \*&c., and averred that the assignments were made to them *bona fide*, for the purposes above mentioned. That the notes charged in their account were given for their responsibilities for *Robinson & Franklins*, and for renewals of from time to time, &c. That the commissions were usual, and such as the *Franklins* agreed to pay.

The defendants *J. & T. Walden*, in their answer, filed the 12th of *October*, 1809, stated particularly the transactions between them and *A. F. & J. F.*, and substantially, as contained in the answer of the latter. They stated, also, that on the 11th of *February*, 1808, they borrowed of *J. & E. Ferris* their promissory notes for 7,000 dollars, for the *Franklins*, for which they were to pay a premium of two and a half per cent. That further aid being necessary to meet the expenses on the arrival of the *Huntress*, they borrowed of *Benjamin Pell* his promissory notes for 15,000 dollars. That *Benjamin Pell & Son* held a bill of exchange, drawn by *John Franklin*, and endorsed by *Franklin, Robinson & Co.*, for 2,500 pounds sterling, which had been returned protested for non-payment, and the drawer and endorsers made liable for the amount. That on the second of *March*, 1808, *J. & T. Walden* entered into an agreement with *B. Pell*, reciting that he having advanced to *J. & T. Walden* his notes for 15,000 dollars, to be received from time to time, &c., they, *J. & T. Walden*, therefore, guaranty to him the payment of the said bill of exchange, to the extent only of the funds which they may have, on a settlement of accounts, due to *A. F. & J. F.* That they, *J. & T. Walden*, believed at that time, that *A. F. & J. F.* would turn out to be insolvent, and this guaranty was the only terms on which the loan was obtained, and by means of which the notes of *Ferris* were paid off. That they claimed of *A. F. & J. F.* all that they, *J. & T. Walden*, were obliged to pay *B. Pell*, in consequence of this guaranty. In a schedule to their answer, they set forth their account with *A. F. & J. F.* And they \*stated that the value of the property assigned fell short of 120,000

1817.

HENDRICKS  
V.  
ROBINSON.

[ \* 293 ]

[ \* 294 ]

1817.

HENDRICKS  
V.  
ROBINSON.

dollars, as estimated, whereby, unless an adequate compensation was allowed them, they would be deprived of a great part of the consideration on which they entered into the agreement with the *Franklins*; and they, therefore, asked the commission on the full sum of 120,000 dollars, or the usual mercantile commissions on all their transactions with the *Franklins*, or some other just and reasonable compensation.

In their answer to the supplementary bill, on the 18th of *June*, 1813, *J. & T. Walden* set forth an account of the sales and disposition of the property, since their answer to the original bill, and in a schedule annexed, exhibited a particular account of the result of their trust, to the 31st of *March*, 1813, by which it appeared, that there remained in their hands 13,732 dollars and 2 cents, being the whole proceeds of the property, and subject to the payment of their commissions, which they stated to be at least 6,000 dollars, and to all their responsibilities incurred for the *Franklins*; and they stated that they were ready to account, and after being paid what was due to them, and exonerated from all their responsibilities, they were ready to pay the residue of the proceeds, &c.

The other defendants also filed their answers, and answers were also put in by the defendants, and by the assignees of the defendants who had become insolvent, to the supplemental bill, filed in *January*, 1813.

The material parts of the proofs and exhibits in the cause are sufficiently stated in the opinion of the Court.

The cause came on to be heard in *October* last, and the argument occupied the Court for several successive days.

*Wells, Brinkerhoff, and Baldwin, (Hoffman also,)* for the plaintiff.

[ \* 295 ] *Harison, T. A. Emmet, and Colden*, for the assignees of \**W. T. Robinson, A. Franklin, and John Franklin, and Henry Franklin*, and in support of the deed to him.

*D. B. Ogden, Harison, and T. A. Emmet*, for the defendants *Minturn & Champlin*.

*Griffin, and J. Radcliff*, for the defendants *J. & T. Walden*.

*Boyd*, for the representatives of *Pell & Son*.

*January* 20th.

The cause stood over for consideration until this day, when the following opinion was delivered by  
232

**THE CHANCELLOR.** The plaintiff files his bill as a judgment creditor of *W. T. Robinson*, and of *Abraham and John Franklin*, to set aside, as fraudulent, certain conveyances of the real estate of *Abraham & John F.* to *Henry Franklin*. The object of the bill is also to set aside certain assignments of their personal estate to the defendants *Minturn & Champlin*, and *Jacob & Thomas Walden*, or that those assignees of the personal estate may account for the proceeds, and that the same may be applied towards the satisfaction of the judgments of the plaintiff.

1817.

HENDRICKS  
V.  
ROBINSON.

The detail of these transactions, and the number of parties whom they necessarily affected, and who were called before the Court, have rendered the pleadings uncommonly complicated and voluminous. A great variety of facts, and many of them very remotely connected, have been brought into the history of the case, and to bear upon the points which have arisen. Several of these points are extremely important, not only in consequence of the amount of the property in question in this case, but as they bring into discussion the relative rights, generally, of creditor and insolvent debtor, in respect to the control and disposition of the estate of the latter.

[ \* 296 ]

I shall proceed to examine each point in its order, and shall endeavor to do it with all possible brevity and simplicity.

1. The first objection to the suit is, that the plaintiff, as a judgment creditor, cannot, singly, and without uniting the other judgment creditors with him, sustain the bill.

I have no doubt that this Court can and ought to lend its aid, whenever that aid becomes requisite, to enforce a judgment at law, by compelling a discovery and account, either as against the debtor, or as against any third person, who may have possessed himself of the debtor's property, and placed it beyond the reach of an execution at law. The preliminary step which seems to be required is, that the judgment creditor should have made an experiment at law, and bound the property, by actually suing out execution. (*Angell v. Draper*, 1 *Vern.* 399.; and see a decision by Lord *Nottingham*, cited in 1 *P. Wms.* 445. *Stileman v. Ashdown*, 2 *Atk.* 476. *Shirley v. Watts*, 3 *Atk.* 200.) The objection, however, in this case, is not to want of power in the Court, but that the plaintiff is not entitled to its aid, because he comes here for himself alone, and does not allege that he is suing in behalf of himself and the other creditors. One creditor may undoubtedly file a bill, in many cases, in behalf of himself and all the others. (18 *Vesey*, 78. 82.) But how does it appear that the plaintiff knew, when he filed his bill, that there were any other judgment creditors? There are

This Court lends its aid to a judgment creditor, by compelling a discovery and account, against the debtor, or a third person who has possession of the debtor's property, and placed it beyond the reach of execution; but the creditor, before he can have the aid of the Court, must have sued out execution at law.

One creditor may file a bill in behalf of himself and all the other creditors; and where one judgment

1817.

HENDRICKS  
v.  
ROBINSON.

creditor filed a  
bill for himself  
alone, it was

[ \* 297 ]

sustained; it not  
appearing that  
there were other  
creditors, or if  
there were,  
there was rea-  
son to believe  
their judgments  
were satisfied,  
or, if not satis-  
fied, that they  
had not taken  
any steps at law  
to enforce them,  
by issuing exe-  
cution; and, at  
any rate, all  
parties concern-  
ed in them were  
before the Court.

Conveyances  
by a debtor of  
his real estate  
declared fraud-  
ulent and void,  
as against his  
creditors.

[ \* 298 ]

none admitted by his bill. The doctrine in *Leigh v. Thomas*, (2 *Vesey*, 312.) and to which I have been referred, is not applicable. In that case, the plaintiffs sued in behalf of themselves and part of the crew of a vessel, for prize money; and by the bill itself, it appeared, there was another part of the crew equally entitled to receive from the defendant a share of the money, though they were no parties to the bill. It was accordingly ruled, upon demurrer, that the residue of the crew must be joined, to have a general account, for otherwise the defendant might be obliged to account to all the other creditors in succession. The bill here was not only silent, but there was no plea or answer in the original suit, setting up any other subsisting judgment. There was only a disclosure incidentally, and for other purposes, that there were, or had been, judgments in favor of *J. & N. Heard*, and of *J. Mowatt*; and, in the supplementary answer, the defendants, against whom the judgments were rendered, aver that they were satisfied by their agent, *H. F.*, who purchased them. It is only the assignees of *H. F.* who now say that they were assigned over to them as part of his estate, and as being in full force. It does not, however, appear, that executions were ever taken out upon those judgments; and that step seems to have been held necessary, by the cases already referred to, before this Court can aid the execution of a judgment at law. If, however, those judgments were to be considered as unsatisfied, and the party not too late with this objection, it is not necessary to be made in this case; for all the parties that can have any concern in those judgments are now before the Court, and as far as those judgments may be entitled to a preference, or to a ratable distribution of the assets to be procured by this suit, that preference can be given, or that distribution made. I am, however, inclined to think, for reasons which will be disclosed hereafter, that these judgments are not now to be regarded.

2. The first important point, on the merits, relates to the validity of the sale of the real estate of *Abraham & John Franklin*, to *Henry Franklin*.

The house of *Franklin & Robinson*, and *John Franklin*, had stopped payment on the 30th of December, 1807. They were seised, at that time, of a real estate, worth, according to their own valuation and subsequent sale, \*721,663 dollars, subject to mortgages to 219,000 dollars. On the 8th of January following, they sold to *H. F.* lands in the state of *Connecticut* for 10,000 dollars, and which sum he passed in his accounts to their credit. Shortly after that sale, but how soon after does not appear precisely, they entered into an agreement with him for the sale of the whole of their real

estate; and in the latter part of *February* the parties proceeded to carry that agreement into effect, by fixing the price of the lands, which was deemed, on each side, a fair and adequate one, and which amounted to above the sum of 721,663 dollars. On the 20th *March*, deeds were executed for several parcels of the land, and on the 29th of *March*, the agreement received its entire consummation by the conveyance of the residue of the lands. The conveyances are all quit-claim deeds, without any general covenant or warranty of title; and between the first agreement to sell and its final execution, the *Franklins* had executed several mortgages upon part of these lands to their creditors, to the amount of 70,674 dollars and 51 cents, which encumbrances were assumed by *H. F.*, and the amount deducted from the consideration. The net price, after deducting the amount of all the encumbrances, including those created pending the execution of the contract, was 431,988 dollars, 49 cents, and, according to the answers of the parties concerned, (for they have not given us any other proof on the subject,) this price was paid or secured in the following manner:

(1.) The account of *Henry* against *Abraham* and *John Franklin* was admitted, which amounted to 143,805 dollars, 43 cents. The account is contained in the schedule (A.) annexed to his answer, and consists of endorsements, of bills of exchange, of notes lent, of the guaranty of debts, of acceptances of drafts, of the charge of being surety in an administration bond, of due bills of the grantors, &c. Some of these charges appear, from the account, to have been then due, some not due; some of them to have been \*then in suit, and several of them to have arisen during the course of the negotiation for the sale of the lands. The grantors state in their answer, that when they stopped payment, the actual and contingent demands of *H. F.* amounted to 120,000 dollars. This long account in the schedule (A.) is quite loose and confused, without satisfactory precision as to dates and circumstances, and without any testimony whatever to support any one *item*. Not a paper is produced which *H. F.* may have been obliged to take up, nor a voucher exhibited of any one payment. The contingent responsibilities were considered and liquidated as so much *actual* debt, though there is no proof that any responsibility was ever incurred. Thus, for instance, one *item* in the account is 7,000 dollars, the amount of an administration bond, in which *Henry* was surety for *J. F.*, but we have no evidence that there was any breach of the condition of that bond.

(2.) The next head of the payment of the consideration, consists of a naked promise of *H. F.* to pay the grantors, in four years, 66,400 dollars, to be appropriated to the pay-

1817.

HENDRICKS  
V.  
ROBINSON

[\* 299]



1817.

HENDRICKS  
V.  
ROBINSON.

ment of the debts of certain confidential creditors, whose names and debts are mentioned in the agreement. There was no promise to pay interest on that sum, and this amount of the consideration was, consequently, on a credit of four years without interest. Nor is there any other evidence than this agreement, and the answer of *A. & J. F.*, of the existence of such confidential debts, or that notice was ever given to those creditors of this provision in their favor.

(3.) The remainder of the consideration, amounting to 221,783 dollars, 6 cents, was settled, by the giving of five notes, payable in one, two, three, four and five years, with interest, but no part of either of these notes has been paid, and a small part only of the sum intended for the confidential creditors. The whole of this immense debt, created by the sale of the real estate, at its fair value, was thus left \*to rest upon the personal promise of *H. F.*, without any other security, real or personal.

[ \* 300 ]

I cannot resist the impression that this sale carries, on the very face of it, strong indications of fraud, or, in the words of the statute, of a "purpose and intent to delay, hinder or defraud creditors." It was made by a mercantile house, after it had become insolvent, and was pressed by the plaintiff for his debt, and had refused to give him any satisfactory statement of their affairs, and had, accordingly, been sued. It was not necessary to place that property immediately in other hands to manage it and to meet the growing demands upon it. The real estate was not immediately expensive to keep, and did not require those prompt and heavy expenditures incident to the possession of their mercantile capital. It was not a sale safe for themselves or the creditors, or calculated to be soon, and extensively, useful to either. The necessary inference seems to be, that it was a sale in trust, and for the purpose of placing the property beyond the reach of creditors. It is contrary to the ordinary course of dealing, and repugnant to the maxims of common prudence, to alienate such an immense real estate, without payment or security. A case of such a sale on such terms, and at the same time absolute and *bona fide*, is without example. Admitting the account exhibited by the purchaser to be just and true, (and this is a concession which he is not entitled to ask without having made some effort to prove his account,) is it probable that a vendor, selling his real property in good faith, and for a fair price, would be content with a naked promise to pay in four years, and without interest, such an amount of the consideration as 66,400 dollars? Or if he might acquiesce in this, because he was acting only as a trustee for certain favorite creditors, when the absence of self-interest might leave him to be more

indulgent, can we suppose that he would submit voluntarily, and without any pressing necessity, \*to leave another part of the consideration amounting to 221,783 dollars, without any other security than simple promissory notes, payable on long credit? And all this extravagant credit was given to a merchant, in most precarious times, who was in the habit (as appears from his own accounts) of almost daily lending and sporting with his responsibilities and credit, to an unlimited extent, and who was, afterwards, involved in bankruptcy, without ever paying a single cent upon these notes! I am induced to conclude that it would violate the dictates of common sense, and equally offend the most popular, as well as the most enlightened sense of justice, to admit such a transaction, under all its attending circumstances, to hold the character of a fair, honest, absolute sale, without any secret trust, or without any views hostile to the rights of the creditor.

It is, indeed, true, that the purchaser and the vendors say, that this was an honest and *bona fide* sale; but do not the facts, which they all admit, outweigh the declaration? And can a mere assertion be compared to the unequivocal language of the facts, and the necessary inference of law?

The conduct of the parties, in other transactions, concerning the disposition of their property, seems to show, that *H. F.* was a mere agent or trustee of the grantors, for the security and deposit of their property. On these questions of fraud, all the circumstances, in respect to the dealings of the parties, are to be considered, and will assist in forming a just and accurate conclusion, especially if those dealings are connected with the complicated movements of one entire concern. *Quæ tingula non prosunt juncta juvant.*

The grantors admit, that they, afterwards, agreed with *H. F.* that he should have credit on his notes, for debts due from them on judgments, in proportion as he might obtain or extinguish them; and he made some unsuccessful \*efforts with the plaintiff to settle his debt. It is further admitted, that after the purchase and the creation of this enormous debt of *H. F.*, resting on his naked promise, and after the extinguishment of all his demands and responsibilities, actual and contingent, the grantors, on the 26th of *April*, 1808, gave him four notes against *Minturn & Champlin*, to the amount of 7,532 dollars and 39 cents, and which sum, when received, (as it was subsequently,) he was to give them credit for on account. But on what account was he to credit this money, when, only a few weeks before, all his demands had been satisfied, and he had become a debtor to them, to near 300,000 dollars? So, again, the grantors, as well as *H. F.*, admit, that on the 7th of *June*, 1808, he received of *N. H.* 851 dollars of their property, for which he gave them credit.

1817.

HENDRICKS

v.

ROBINSON.

[ \* 301 ]

[ \* 302 ]

1817.

HENDRICKS  
v.  
ROBINSON.

[\* 303 ]

One would naturally suppose, from these facts, that, instead of being the debtor to such an enormous amount, after all possible demands of his had been silenced, that he continued really a creditor, and was under constant alarm, and induced to exercise uncommon vigilance for the security of himself. There are several other very unaccountable facts in this case. The grantors say, and *H. F.* agrees with them in the fact, that since they stopped payment, he had been making advances and payments to them to the amount of 33,000 dollars, and was constantly supplying their necessary wants, and that this amount of charge was *distinct* from the consideration of the sale; that is, it was distinct from every kind of demand, down to the 29th of *March*, 1808, which demands went to swell the account of *H. F.* to 143,803 dollars and 43 cents, and which were all absorbed in the consideration of the sale. But it is further admitted, that on the 3d of *April*, *only five days after the completion of the sale*, the grantors gave *H. F.* an order on *Minturn & Champlin*, for the unascertained balance that might be coming from the assignment of the \*ships and cargoes, which had been made to them; and for that sale of that balance, they were content to receive, and did receive, his notes, payable in one, two and three years, for 45,000 dollars. This was an astonishing instance of accumulated credit. The sale was, however, rescinded, by mutual consent, a year afterwards, when the grantors found it to be an obstacle in the way of their arrangements with *M. & C.* respecting that residuary interest, over which they still acted as owners. The grantors did, also, on the same 3d of *April*, 1808, sell to *H. F.* the unascertained balance that might be coming to them, under their assignments of ships and cargoes to *J. & T. W.* Here, also, they took in payment his notes, for this computed balance, to 21,000 dollars, payable in one, two, and three years. These notes were without interest, and so probably were those given for the balance in the hands of *M. & C.*, though it could not have been known but that those balances might speedily be paid. Here were, then, new sales to *H. F.* following close upon the other, and new credit given to him, to 66,000 dollars, in a very heedless and extraordinary manner, by his single notes, payable at distant periods, without interest!

*Henry F.* claims, through his assignees, the judgments of the *Heards*, and of *Mowatt*, and of the *Millers*, against the grantors; but here the grantors avow his agency in buying in those judgments, and declare that they were satisfied by him as *their agent*. How can we possibly conclude otherwise, from a combined view of all these circumstances, than that *Henry F.* acted, *throughout*, as the agent, or trustee, of the grantors; and that the sale of the whole real estate

was made purposely to cover the property, and protect it from the process of creditors?

I am, therefore, of opinion, that these conveyances ought to be declared fraudulent and void.

3. The next point is, whether the assignment of the ships *Manhattan* and *Milwood*, and their cargoes, by *A. & \*J. F. to M. & C.* were fraudulent, or valid assignments; and if valid, then upon what principles shall the assignees be held to account?

These assignments were made on the day that the *Franklins* stopped payment. The avowed object was security and indemnity for advances and responsibilities, which had been made, or which might thereafter be incurred. The deeds stated that *M. & C.* had made sundry advances and engagements for the grantors; and this is so declared in the answers of all the parties to the assignments, and proved by *Stansbury* and the other witnesses for these defendants, who, taken together, prove the whole substance of the answer. The answer of *M. & C.* states, that the notes in schedule (A.) were given for, or in consequence of responsibilities incurred before the assignment; but I do not find that the proof explicitly establishes this. The clear existing responsibilities, when the assignments were made, were the contingent security to one of the banks for 40,000 dollars; the *respondentia* bond for a loan of 80,000 dollars, borrowed jointly with the grantors, on the cargo of the *Manhattan*, then on a voyage to and from *Batavia*; the engagement to meet the drafts of the supercargo on that voyage, which, as it afterwards appeared, amounted to 72,575 dollars, 50 cents; and the engagement to pay, on behalf of the grantors, the bills of *Brown & Co.*, of *Bordeaux*, one of which they afterwards accepted to the amount of 6,477 dollars, 87 cents.

These existing engagements were sufficient to justify the call upon the falling house of the *Franklins*, for the assignment of property in pledge; and under the peculiar situation of affairs at that time, it would have been difficult to have measured, with much precision, the necessary extent of the pledge. The circumstances under which these assignments were made, are not to be overlooked when we are considering their character and effect. One of the ships and cargoes was owned by *M. & C.* jointly \*with the *Franklins*. That house had, at the time, stopped payment. A general embargo had just been laid, which was indefinite in point of time, and the reasons upon which it was understood to be supported, gave the public ground to presume, that the foreign commerce of the country was to undergo a long suspension. The event justified the anticipation, for the embargo was continued with unrelaxed severity for near eighteen

1817.

HENDRICKS  
V.  
ROBINSON

[ \* 304 ]

Assignments  
by a debtor of  
personal property  
to a particular creditor,  
under what circumstances valid.

[ \* 305 ]

1817.

HENDRICKS  
V.  
ROBINSON.

months. What were the *Franklins* to do, in such a new and distressing state of things, with their *East India* ships and cargoes daily expected? By stopping payment, they had avowed, if not an irredeemable insolvency, yet, at least, an absolute disability to prosecute business, and their credit was prostrate. They were not, therefore, able to meet the growing and heavy expenses which such arrivals, under the pressure of the embargo, would necessarily call for. The property must have been abandoned and sacrificed, or confided to the hands of other houses which had funds and credit adequate to the exigency of the case. The state of business arising from foreign commerce was excessively perplexed and alarming, and expedients were then allowable, which, perhaps, no other state of things could require, and which ought to be regarded with an indulgent eye, in reference to that crisis. I have no doubt that the assignment of the *Manhattan* and her cargo was justified under the then state of things, without any other existing responsibilities than what must necessarily have fallen upon *M. & C.*, in consequence of their joint interest in that property. It would equally have been the dictate of necessity and a sound discretion, without reference to the extent of their demands upon the *Franklins*, to have assigned the *Milwood* and her cargo to *M. & C.*, or to some other house equally competent, by its credit and resources, to hold and manage the property, as trustees, for whomsoever it might eventually concern.

[ \* 306 ]

\*It is not necessary, however, to place the case on this ground, for the *existing* responsibilities were, of themselves, a valid consideration for the assignments; but it appears to me, that if there had been no existing engagement or debt whatever, the *Franklins* had a right to have assigned over the ships and cargoes to *M. & C.* in trust, and, upon terms that were honest and fair, to sell the same, and, as agents or factors, to indemnify themselves for the *general* balance of their account, or for advances and responsibilities *thereafter* to arise. We have no bankrupt system to control the acts of the insolvent merchant, and in the absence of all legal liens, he may make such an assignment as I have suggested, provided it bears the marks of a reasonable discretion, and there is perfect candor and honesty in the intention. The creditor cannot interfere and control the disposition of the property, until he has created a lien by process of law, or without application to this Court, which will make the trustee duly account for the surplus, which may be stayed in his hands; this Court will also make him, as well as the debtor, answerable for any want of integrity in the whole proceeding.

I cannot entertain a doubt that the assignments in question were well and *bona fide* made. There were large existing responsibilities, affording sufficient aliment to support the assignments. Those responsibilities were changing every day, by reason of the rapidity and busy circulation of commercial paper. Nor do I doubt, from the fact of the admissions of all parties, and from the testimony of their clerk, that the notes of *M. & C.*, of a date immediately subsequent to the assignments, were only a continuance, under new shapes and renewals, of the prior engagements. Indemnity is a good consideration within the statute of frauds; (1 *Burr.* 474.) and I consider it to be a principle clearly settled, that a debtor, in failing circumstances, may prefer one creditor to another, and assign to \*him part of his property in trust to pay the debt. An examination of a few cases will leave no doubt of the existence of this rule. Lord *Holt*, in *Hopkins v. Grey*, (7 *Mod.* 139.) recognized the right of a debtor in insolvent circumstances to prefer one creditor to another, as a right then well known, and in daily use; and the modern cases frequently take notice of it.

It was decided by the K. B., in *Estwick v. Cailland*, (5 *Term*, 420.) that if a person, having several creditors, convey, by deed, the legal interest in part of his real and personal estate to a trustee, in trust, (after deducting the expenses of the trust,) out of the rents and profits to pay half the surplus to the grantor for his own use, and the residue among certain creditors named in a schedule, without any intention of fraudulently delaying the creditors not named, in obtaining their demand, the deed is valid in law. The debt of the creditor who called the deed in question existed long before the deed, but no suit had then been commenced. The only question raised at the trial was, whether the deed was void under the 13th *Eliz.*, as being made to delay, hinder and defraud creditors. It was decided, that there was no fraud in the case; and Lord *Kenyon* said, and the other judges concurred in the opinion, that it was neither illegal nor immoral to prefer one set of creditors to another. The deed was good as far as the creditors in the schedule were concerned; and it was intimated, that after the schedule debts were satisfied, equity would probably direct the surplus towards satisfying the other creditors. So, in *Nunn v. Willsmore*, (8 *Term*, 521.) the grantor conveyed the lease of a farm, and all his effects and debts, to trustees, in consideration of a sum to be paid by one of them, in trust, to dispose of the property, and out of the proceeds to reimburse the trustee the sum advanced, and the other demands of the trustee, and then to pay *such of his debts as the trustees should, in their discretion, think proper*, and the surplus to be held \*for the use of his wife. This deed was

1817.

HENDRICKS  
v.  
ROBINSON.

Assignments of personal property by a debtor in insolvent circumstances, and who has stopped payment, to secure a particular creditor for existing claims and engage-

[ \* 307 ]  
ments, as well as for future advances and responsibilities, if made *bona fide*, and under circumstances which leave no doubt of the honesty and fairness of the transaction, will be deemed valid.

[ \* 308 ]

1817.

HENDRICKS  
V.  
ROBINSON.

held good within the 13th of *Eliz.*; that it was neither fraudulent in fact, nor voluntary, from which the law infers fraud, and that, putting the bankrupt laws out of the case, a debtor may assign all his effects for the benefit of particular creditors. So, again, in *Meux v. Howell*, (4 *East*, 1.) after a creditor had distrained for rent, the debtor confessed judgment to another creditor, with a view to cover, and make a ratable distribution of his property among all his creditors. This judgment being in fact *bona fide*, and upon good consideration, was held not to be fraudulent within the statute; and Lord *Ellenborough* said, that it was not every feoffment, judgment, &c., that may have the effect of delaying or hindering creditors, that is fraudulent within the statute. This is the effect, *pro tanto*, of every assignment that could be made by one who has creditors. Every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, &c. must be devised of *malice and fraud*, to bring it within the statute. The object of the statute was to prevent deeds, &c., fraudulent in their inception and intention, and not merely such as, in their effect, might delay or hinder other creditors.

The same doctrine has been frequently recognized by the Supreme Court of this state; (3 *Johns. Rep.* 84. 5 *Johns. Rep.* 344.) it is also admitted in the Courts of equity. (*Small v. Oudley*, 2 *P. Wms.* 427. *Cock v. Goodfellow*, 10 *Mod.* 489. *Phoenix v. Assignees of Ingraham*, 5 *Johns. Rep.* 412. 426, 427.) Nor is an assignment, if honestly made, bad, though made to secure against future, as well as present, responsibilities. It is altogether a question of intention, and if that be free from fraud, the assignment is not void within the statute. It was accordingly said, by the Supreme Court of the *United States*, in the case of the *United States v. Hooe*, (3 *Cranch*, 73.) that \**"it is not in itself exceptionable that property should be bound for future advances. It may, indeed, be converted to improper purposes, but it is not positively inadmissible. It is frequent for a person who expects to become more considerably indebted, to mortgage property to his creditor, as a security for debts to be contracted, as well as for that which is already due."* The same doctrine was afterwards established by the same Court, in *Chirras v. Caig*, (7 *Cranch*, 34.) and a mortgage was held to secure debts contracted afterwards, on account of prior advances or liabilities. This is not a new doctrine. It depends upon the circumstances of the case, how far a subject pledged for a debt may be considered as a security for further loans. This is the amount of the language of the master of the rolls, in *Jones v. Smith*; (2

[ \* 309 ]

*Vesey, jun.* 372.) and in *Demainbray v. Metcalfe*, (2 *Vern.* 698.) this extension of the security was admitted. The plaintiff, in that case, pawned jewels to *K.* for 110*l.*, to be redeemed in one year. *K.* delivered them to the defendant as a pledge for 200*l.*, and afterwards borrowed 88*l.* of the defendant, on notes. The chancellor held, that as the defendant lent, as well the 88*l.* as the 200*l.*, on the security of the pledge, though he took notes for the last loan, the plaintiff could not redeem, without paying all that was due to the defendant. Without meaning to sanction this case, in all its extent, it is sufficient to show the existence of a rule which the Court is competent to tolerate. We cannot but perceive the fitness of its application to this case, in which the debtor had the most powerful and justifiable inducements, in the then state of things, to assign his *East India* ships and cargoes, not merely to indemnify against present, but to provide against future advances, and to give the assignees a *lien* for the general balance of their account. It was admitted, in *Green v. Farmer*, (4 *Burr.* 2214. 1 *Black. Rep.* 651.) that a factor has a *lien* for his general balance. When the present assignments were made, no legal *lien* existed, \*nor was a suit commenced; and it is not true, as our law now stands, that the debtor who stops payment, is thereby absolutely disabled from making a disposition of personal property upon the terms of these assignments. There is no such absolute disability going to every assignment, however honest the motive, or provident the act, or cogent the necessity.

I am, accordingly, of opinion, that these were fair and valid assignments, for purposes authorized by law; and the next and only inquiry is, whether there is any surplus which this Court ought to direct towards the satisfaction of plaintiff's debt.

4. *M. & C.* took possession of the ships and cargoes when they arrived, and the same not being redeemed within three months, according to the proviso in the deeds of assignment, the legal title to the property became absolute. The assignees continued to bear all the expenses, and make all the disbursements which the entry and safe keeping of the property required. These charges were exceedingly heavy, amounting to upwards of 167,000 dollars. The difficulties, with regard to this property, were great and increasing, owing to the interdiction of commerce. The cargoes were principally intended, not for home consumption, where the demand was not sufficient, but for the *European* market. At last, in *March*, 1809, the grantees sold the ship *Manhattan*, with the approbation of the *Franklins*, and in *April* following, they became, themselves, the purchasers of what may

1817.

HENDRICKS  
V.  
ROBINSON.

[ \* 310 ]



1817.

HENDRICKS  
v.  
ROBINSON.

[ \* 311 ]

A creditor to whom his debtor has assigned property as security for advances and responsibilities, with an agreement that if the property was not redeemed within a certain time, the assignee might sell to pay and indemnify himself, may, after the expiration of the time limited, sell the property for indemnity; and may, with the assent of the debtor, become the purchaser thereof, and of all the equitable or residuary interest of the debtor, at a fair and adequate valuation; and such purchase, if made *bona fide*, and without intent

[ \* 312 ]

to injure or defraud other creditors, will be valid, not only against the debtor, or *cestui que trust*, but against all other persons.

be termed the equity of redemption in the other ship, and in the cargoes, by an arrangement between them and the *Franklins* as to the price. *M. & C.*, and the *Franklins*, say, that the time of the agreement for the sale of the cargoes was in *June*, but the witnesses say it was in *April*, 1809. I am entirely satisfied that the true time was *April*, and that the parties have named *June* by mistake, though it does not strike me as very material which was, in fact, the true date. The merits \*do not turn upon such a circumstance. As the grantors had become confessedly insolvent, without any hope of being able to redeem the property, and as the prices agreed on between the *Franklins* and *M. & C.* were undoubtedly a fair and reasonable valuation of the *Milwood* and the cargoes, I see no objection to the arrangement which was made. The small, trifling retail of, comparatively, a very small part of the cargoes, at something of an advance price, I do not think deserving of much weight, in forming an opinion of the reasonableness and integrity of the sale of the whole cargoes. *M. & C.* had an undoubted right to sell the cargoes, for the purpose of indemnity and payment. That right was given them by the deeds of assignment, and the only question that can be made is, whether they could not themselves become the purchasers, by accepting a release for a valuable consideration, or, what is the same thing, in this case, by the subsequent assent of the grantors, founded on a fair and adequate valuation. I see no objection to this measure, provided it does not interfere with any legal or equitable lien belonging to others, and provided it be done in good faith, without any views injurious to the claims of creditors. The only question that can arise is, Was the release of this residuary interest honest, and for a fair price? The *Franklins*, who were the *cestui que trusts*, are not calling in question the purchase from them by their own trustee, and even if they were plaintiffs, it would not necessarily follow that they could set aside the purchase; for it is well settled, (as I had occasion lately to examine in the case of *Davoue v. Fanning*,†) that a trustee may, under certain circumstances, purchase from his *cestui que trust*. There was no trust created by the assignments in favor of any third person. The plaintiff, as a creditor, is not entitled to interfere with the purchase, except upon the ground of fraud, or because he had acquired some legal or equitable \*title to the property, prior to the sale. We will now see whether any such pretension to title be well founded.

The plaintiff had issued execution on his judgments at law, the 6th of *February*, 1809, and, on the day following, the sheriff called on *M. & C.*, and showed the executions.

† *Ante*, p. 252.

and asked for the property of the *Franklins* in their possession. I cannot see upon what principle the executions affected or touched the residuary equitable interest of the *Franklins*, in the property which had been assigned. The legal title had become absolute in *M. & C.*, and a mere equity is not within the reach of process at law. I do not know of any case in which a Court of equity has considered an execution at law as binding an equitable right. The idea is altogether inadmissible. If the execution cannot sell, there is no reason why it should affect or bind a mere equity, and the doctrine would be equally inconvenient and absurd. The party's only remedy, if he wishes to prevent the assignment or release of a chose in action, is by application to this Court; and without such aid, the validity of the transfer will depend entirely upon the question of consideration and fraud.

The suing out of an execution is not, perhaps, sufficient, of itself, and without some further act, to stop the alienation of even a legal interest, or of the goods and chattels of the debtor, for a valuable consideration, to a stranger to the execution. A seizure, a taking into possession, an inventory, or some other *act*, amounting to what is understood by an actual *levying* of the execution, is requisite, as I am inclined to think, to create a bar to a subsequent *bona fide* sale. The words of the statute are, that no execution shall bind the property of the goods *but* from the delivery to the sheriff, and it does not appear to have fixed upon that period as *absolutely* binding the goods under all circumstances, but only that the *lien* shall not be carried *further back* than that period. In the case of *Lowthall v. Tonkins*, (1740. 2 *Eq. Cas. Abr.* 380. pl. 14.) \*the question came before Lord *Hardwicke*, how far an alienation of goods, by the debtor, subsequent to the delivery of the execution to the sheriff, was valid, and his opinion clearly was, that it was not necessarily void. He observed, that neither before nor since the statute of frauds, was the property of the goods altered, but continued in the defendant, until execution *executed*. The meaning of the statute was, that after the writ was delivered to the sheriff, if the defendant made an assignment of his goods, unless in market overt, the sheriff might take them.

It appears to me, therefore, upon a consideration of all the facts, that *M. & C.* are accountable only for the proceeds of the property assigned, according to the price of sale agreed upon between the parties; and, for the same reason, they are entitled to the commissions which were agreed to be allowed them. This was a question entirely between the parties to the assignments; they were competent to settle the compensation upon fair and reasonable terms; the cred-

1817.

HENDRICKS  
v.  
ROBINSON.

The mere equitable interest of a debtor in property assigned as security cannot be reached by process at law, or bound by execution.

The mere suing out of an execution does not create a lien on goods and chattels; but there must be an actual levying of the execution, to create a bar to a subsequent *bona fide* sale.

[ \* 313 ]

The property in goods is not changed until the execution executed.

1817.

HENDRICKS  
V.  
ROBINSON.

itors of the *Franklins* have nothing to do with that allowance, any further than to see that it was honestly allowed, and not for colorable and fraudulent purposes. If the allowance had been unusually and extravagantly high, it might then have been evidence of a fraudulent appropriation of property. But the case does not warrant that inference, and we have no evidence to prove that the commissions allowed were more than a just and adequate compensation. If there be no inference of fraud, the *quantum* of the allowance cannot be called in question.

Upon the whole, I am of opinion, that the defendants *M. & C.* are to account for the property assigned, according to the sales and charges contained in the account current annexed to their answers. This account has been examined and ratified by the *Franklins*; and it appears to \*me to be sufficiently proved by the witnesses adduced on the part of *M. & C.*, all of whom appear to be competent for that purpose, and to have no interest in the controversy between the plaintiff and those defendants. By that account, the defendants *M. & C.* have duly accounted, and there is a small balance in their favor. If, however, the plaintiff wishes to have that account further investigated before a master, he must do it at the peril of costs, and upon the admission of the principles of this decree; but I do not, at present, see any reasonable cause why the defendants *M. & C.* should be subjected to that burden.

[ \* 314 ]

5. The next branch of this complicated cause relates to the proceeds of the assignment of certain vessels and cargoes to *J. & T. Walden*.

These assignments were made to procure a loan of money, and for the security of existing responsibilities. The *Franklins*, when they stopped payment, applied to the *Waldens* for a loan of 30,000 dollars, and the loan was effected, upon receiving an assignment of two thirds of the ship *Sorage*, and the ship *Huntress*, and the schooner *Hope*, and their cargoes, by way of security for the loan, and for pre-existing engagements. The deposit may seem large, being property estimated at 120,000 dollars, for debts and advances to 44,000 dollars, and a remotely contingent security to the bank for 15,000 dollars. But, as has been already observed, the times were disastrous, and full of peril to all commercial speculation and dealing, and the expenses incident to the entry, storage and security of foreign cargoes, necessarily great. The *Franklins* had no means of their own; they, therefore, acted discreetly in borrowing money upon that property, and in consigning it, by way of indemnity, to be sold upon commission. The only real question that can arise in respect to this transaction is, Have these trustees duly accounted?

Both parties agree as to the terms of the trust, notwithstanding the assignments were absolute.

\*One principal point in the case is, whether the claimant, under the guaranty of the 2d of *March*, 1808, (and who appears to be now the assignee of *Coffin & Pell*,) is entitled to be paid out of the surplus, in preference to the plaintiff. I am of opinion that he is entitled to that preference, provided the engagement was fairly and *bona fide* made at the time. The *Waldens* were in possession of the property by an assignment absolute on its face; and by their agreement with the *Franklins*, they were to receive indemnity from the property against all their existing and future engagements on behalf of the grantors, and especially against such as should necessarily arise in the management of the property. They effected a loan of money for the purposes of their trust from *Benjamin Pell*, upon the condition of giving him a guaranty of the debt he held against the *Franklins*, to be paid out of the proceeds of the assignments. This was considered as an advantageous loan upon that condition; and the question is, Shall this Court divert the proceeds from the fulfilment of that guaranty to the payment of the plaintiff's debt? The plaintiff, at the time of this guaranty, had commenced his suit, but had done nothing more. The debt of *Benjamin Pell* stood upon equal pretensions, and the debtors might have elected to have given a preference to either. The plaintiff is not entitled to the aid of this Court in pursuit of those proceeds, until all prior legal and equitable liens are satisfied. It may be that the *Waldens* had no right, under the agreement, to bind the *Franklins* by such a guaranty. Suppose this were to be admitted, yet the plaintiff does not stand here as the representative of the *Franklins*, to litigate every charge against them upon strict legal principles. The inquiry is, whether *Pell* did not acquire, by that guaranty, an equitable lien, which the plaintiff ought not to be permitted to question. He lent his money on the express condition of such a guaranty. It was a condition which he had a right to prescribe. The loan \*was deemed beneficial for the interest of the *Franklins*, even upon that condition, and they have never complained of it. It was the appropriation of so much of their property towards the discharge of a just and *bona fide* debt. The *Waldens*, who made this guaranty, or pledge, of these proceeds, had, at the time, the absolute legal title to the property; and the loan thus procured, went to answer the purposes for which the trust was created. The claim of *Pell* has, accordingly, an equity, in respect to these proceeds, which the plaintiff has not, and it ought to be preferred.

The next disputable item in the account of the *Waldens*,

1817.

HENDRICKS  
v.  
ROBINSON.

[ \* 315 ]

Where *F.*, a debtor in embarrassed circumstances, made an assignment (on the face of it absolute) of property to *W.*, a creditor, as security for a new loan of money, and for existing claims, and, also, for indemnity against existing and future engagements, especially all such as should arise in the management of the trust; and *W.*, for the purposes of the assignment, effected a loan of money of *P.*, on condition of guarantying to him a debt due to him from *F.*, to be paid out of the proceeds of the property so assigned; it was held that *P.*, by lending his money to *W.* on this guaranty, acquired an equitable lien on the proceeds of the property,

[ \* 316 ]

and was entitled to be paid his debt out of the proceeds in the hands of *W.* in preference to other creditors.

1817.

HENDRICKS  
V.  
ROBINSON.

is the charge of commissions, which was a matter of agreement at the creation of the trust, and if made in good faith, as we have no reason to doubt, the agreement is not now to be disturbed. The parties were competent to judge for themselves at the time of the original agreement, what would be a suitable compensation under the then existing circumstances; and a third person can have no right to interfere, unless the allowance be so disproportionate to usage and the nature of the service, as to be evidently a colorable disposition of property to defraud creditors.

There is a question also before me, as to the competency of the proof offered by the *Waldens* in support of their answer. But after settling the principles in all the disputed points arising on stating their accounts, they can, if necessary, be put to the proof of their account in the examination before the master. I presume, however, that after this opinion, the plaintiff will not think it necessary to pursue an inquiry before the master, as it is understood that there will be no surplus remaining to which he would be entitled.

[ \* 317 ] I shall, accordingly, decree that the several conveyances of real estate from *Abraham & John Franklin* to *Henry Franklin*, as stated in the pleadings, and made in \*the months of *February* and *March*, 1808, be declared fraudulent and void; and I shall reserve the question of costs, and all further questions, until the plaintiff shall have had an opportunity of applying, if he shall so elect, for a reference to a master to take and state, upon the principles of this opinion, the accounts of *Minturn & Champlin*, and of *Jacob & Thomas Walden*, as assignees of the vessels and cargoes in the pleadings mentioned.

Decree accordingly.

1817.

  
 EASTBURN  
 V.  
 KIRK.
EASTBURN AND DOWNES *against* KIRK.

Where the parties, by mutual consent, withdraw a cause from the Court, before hearing, for the purpose of settlement by arbitrators, and on certain terms, one of which was, that "the question of costs in the chancery suits, being original and cross suits, should be submitted to the chancellor," the Court will not decide the mere question of costs, but leave each party to pay his own costs.

Costs rest in the sound discretion of the Court, to be exercised upon a full view of all the merits and circumstances of the case.

A rehearing is not granted for costs only, except in special cases; nor will an appeal lie for costs merely.

THE parties in this suit were copartners in trade, in the bookselling business, and on the 3d of *March*, 1815, the plaintiffs filed their bill to obtain a dissolution of the copartnership, on various charges of abuse of trust, and misconduct in the defendant, as a partner. The term of the copartnership had some years still unexpired. An injunction was obtained, prohibiting the defendant from interfering with the partnership business. This injunction was dissolved upon the coming in of the answer, denying all the charges of improper conduct. The cause was then \*put at issue, and much testimony taken on each side. On the 10th of *July*, 1816, and before any hearing on the merits, the parties, by agreement under seal, dissolved the copartnership, and entered into a number of stipulations respecting the settlement of the concern, and referred a number of matters to the decision of arbitrators. It was further stipulated in the agreement, that "the question of costs in the chancery suits, (alluding to this suit and a cross suit instituted by the defendant,) be submitted to the chancellor."

January 20th.

[\* 318]

In pursuance of this last stipulation, the correspondence between the parties prior to the filing of the bill, the pleadings, and the very voluminous mass of testimony, were submitted to the inspection and consideration of the chancellor, without note or comment.

THE CHANCELLOR. When a cause is taken out of Court before hearing, by a settlement between the parties upon some points, and by a reference to arbitration upon others, it does not appear to be fit and proper that I should be obliged to decide upon the merits, in order to determine a question of costs. Lord *Hardwicke* has said, (2 *Vesey*, 223.) that one can never come into this Court to pray a decree for costs only. Costs in chancery do not depend upon

1817.

EASTBURN  
v.  
KIRK.

[\* 319]

any statute, nor do they absolutely depend upon the event of a cause. They depend upon conscience, and upon a full and satisfactory view and determination of the whole merits of a case. They rest in sound discretion, to be exercised under a consideration of all the circumstances. Am I then to agitate all the points, and judge of the weight of all the testimony, and draw all the inferences which an investigation of the subject might lead to, merely to determine a question of costs, after the parties have voluntarily withdrawn the cause? I believe there is no precedent for such a proceeding. and sound policy would \*seem to condemn it. A litigation for costs only, is never favored in a Court of equity. A party cannot have a rehearing for costs only, except in special cases, and it is understood that an appeal will not lie merely for costs. The great burden of proof in this case is parol. and probably there is much difference and contradiction among the witnesses. On a discussion of the merits, it is always in the discretion of the Court to award an issue, if material facts are doubtful, and depend upon the credit due to various and contradictory testimony. Could I take such a step, or would it be tolerated, on such a question as this: If the parties have come to an accommodation, or are in a course of pacific settlement, is it useful or conducive to the ends of justice, that all this late angry controversy should be explored, discussed, and decided upon, merely to determine and declare on which side the whole or the greater fault lies? I am decidedly of opinion, that I ought not to undertake the examination for that purpose.

My opinion, therefore, is, that as the parties have withdrawn the cause before the hearing, and settled the merits out of Court, on terms acceptable to both, I ought not to discuss the merits merely for the costs; and consequently, that each party must pay his own costs, and that no costs can be charged by one party against the other.

1817.

DENTON  
v.  
JACKSON.

\*DENTON and others *against* JACKSON and others.

The undivided lands, or *plains, marshes* and *beaches*, situate in the town of *Hempstead*, and included in the tract of land granted, in 1644, by the *Dutch* governor *Kieft*, and, afterwards, in 1685, by the *English* governor *Dongan*, belonged to the *town*, in its collective or *corporate* capacity, as *common* property, and not to *individuals*, or to the heir of the surviving patentee, or those deriving title from the patentees or associates; and those lands remained common undivided property, belonging to the freeholders and inhabitants of *Hempstead*, at the time the town was divided, in 1784, into *North* and *South Hempstead*.

Whether the freeholders and inhabitants of *North Hempstead*, in their new corporate capacity, are entitled to any share in those *plains, &c. Quære?*

Private individuals, freeholders, and inhabitants of that town, cannot file a bill in behalf of themselves, and all others who may come in and contribute to the expense of the suit, or in behalf of the town, to try or establish the rights of the town, in regard to its common property.

THIS suit was brought to determine a controversy relative to certain *plains, marshes*, and a *beach*, situate in the town of *Hempstead*, in the county of *Queens*, before the division of that town into two towns, by the names of *North Hempstead* and *South Hempstead*, and which were, after that division, situate in *South Hempstead*, now called *Hempstead*.

January 21st.

The plaintiffs are freeholders and inhabitants of *North Hempstead*, prosecuting for themselves and all others similarly circumstanced, as to their freehold estate, or who have equal or similar rights with the plaintiffs, in the *plains, marshes*, and *beach* in question, and who should come in and contribute to the expenses of the suit.

The defendants belonged to the town of *Hempstead*, and the bill supposed that some of the defendants, *Bedell, Baldwin*, and *Lott*, had similar rights to those of the plaintiffs; that *Allen* and *Whaley*, two of the defendants, are freeholders and inhabitants of *Hempstead*, but do not claim similar rights; and the other defendants are inhabitants merely of the town of *Hempstead*, and vote at the town meetings.

\*The plaintiffs alleged that the *plains, &c.* belonged to all persons who derive title under the patentees of the original town of *Hempstead*, their associates, heirs and assigns, as *tenants in common*, whether inhabitants of either of the present towns, *Hempstead* and *North Hempstead*, or of any other place, and that the legal title is in *Jacob S. Jackson*, their trustee.

[ \* 321 ]

The defendants, except *Jackson*, against whom the bill was taken *pro confesso*, insisted that the premises in question are *town commons*, formerly belonging to the town of



1817.

DENTON  
v.  
JACKSON.

*Hempstead*, before its division into two towns, and since that division, to the town of *South Hempstead*, now known and called by the name of *Hempstead*, in exclusion of every other town and person.

As all the material facts of the case are noticed in the opinion of the Court, it is unnecessary to state the pleadings or proofs. The bill prayed that the rights of the plaintiffs, and of all other persons, either as a town or towns, or as individuals, might be declared and established, and the necessary conveyances or releases be made, to enable those who have right, to enjoy the same according to such right, in exclusion of all others; and that they may be enabled to make partition among themselves, or that the Court would make partition, according to justice and equity.

October 7th,  
8th, 9th, 10th,  
1816.

The cause was argued by *Harison, Riggs*, and *T. A. Emmet*, for the plaintiffs; and by *Hoffman, S. Jones, jun.*, and *Wells*, for the defendants.

The following points were raised on the part of the plaintiffs: 1. The patent from Governor *Kieft*, under the authority of the *Dutch* government, vested no legal title to these lands in any person.

2. Admitting even that the *Dutch* patent did confer a legal title, that title was actually, or virtually, surrendered, by applying for, and accepting, the patent from Governor *\*Dongan*; more especially, as the latter patent gave new boundaries, reserved portions of the land, and a quit rent.

3. The patent under Governor *Dongan* vested the lands therein described, or at least all the undivided lands, marshes, &c., comprehending the premises in question, in the persons therein named, in fee, as joint tenants, in trust, for the benefit of themselves and their associates, the freeholders and inhabitants of the town, their heirs, successors, and assigns.

4. That the legal estate in the premises survived to *John Jackson*, the longest liver of the patentees, and descended from him to *Jacob S. Jackson*, his heir at law, and who is a trustee for the heirs and assigns of the said patentee, and their associates, according to the extent of their rights.

5. The words in the patent, "their associates, the freeholders and inhabitants of the said town of *Hempstead*, their heirs, successors and assigns," are limited to those persons who contributed to the expense of obtaining the patent, as appears by the votes of town meetings on that subject, and the deed executed to *John Jackson*, the surviving patentee; and that, consequently, those persons only are beneficially interested in the premises in question who have a title, by de-

scent or purchase, from those who purchased and paid for the *English* patent.

6. The interest in the lands, &c. vested in the patentees and their associates, their heirs and assigns, as *distinct* from their other freehold estates.

7. If the premises in question did not exclusively belong to the patentees, and those who paid for the *English* patent, the same belonged to the freeholders of the town of *Hempstead*, exclusively, their heirs and assigns.

8. The division of the town of *Hempstead* did not divest the rights of individuals, under the patent, but they remain as before.

\*9. The plaintiffs, being men of *North Hempstead*, are entitled to maintain the suit for themselves and all others of that town, having an interest in the premises; and the defendants, being partly heirs and assigns of patentees and associates, and partly freeholders, some of whom are not vested with the patent rights, and some inhabitants merely of the present town of *Hempstead*, are competent to defend the suit, and a decree will bind all persons of both towns.

10. The rights being established, it is competent to the Court to decree a *partition*, and to refer it to a *master*, to ascertain the persons interested, and the proportions of each, and the quantity of the premises in question to be divided, and to award a commission to have the partition made accordingly.

11. If the partition ought not to be made, or should be found impracticable, it will be competent to the Court to establish the right, and to guard against intrusions, or interruptions of it, by all others.

12. If there be any right in the plaintiffs and those for whose benefit the suit is brought, the same is cognizable in this Court, on account of the *trust*, and because of the great number of persons interested, and the remedy at law being defective and difficult.

The defendants stated the following points:

1. That the plaintiffs have no *equity* to entitle them to a decree against the defendants.

2. That the bill ought to be dismissed, for want of proper parties.

3. That there is no such *exclusive* right or title in the premises in question as is set up by the plaintiffs.

4. That the premises are *common and undivided* lands of the town of *Hempstead* exclusively, and the freeholders and inhabitants of the town are entitled to the free and common use thereof, subject to the regulations of the freeholders and inhabitants, in town meeting assembled.

1817.

DENTON  
V.  
JACKSON.

[ \* 323 ]

1817.

DENTON

v.

JACKSON.

January 21st.

\*The cause stood over for consideration to this day, when the following opinion was delivered by

THE CHANCELLOR. 1. The first and principal question is, whether the lands, of which partition is sought by the bill, be individual property, belonging either to the heir of the surviving patentee, or to those who derive title from the patentees and their specified associates, or whether it be common property of the town of *Hempstead*, and subject to its exclusive disposal.

To determine this question, we must recur to the original grants, and to the construction which they have received.

The Dutch patent for the town of *Hempstead*, in 1644, conferred a qualified corporate capacity on the inhabitants.

The town of *Hempstead* was settled in 1644, under a patent from *William Kieft*, the then governor of the Dutch province. That patent granted the tract of land forming the town, to six persons, by name, with their *associates, their heirs and successors, to build a town, and fortifications, and a house of worship, and to erect a body politic or civil combination among themselves, and to nominate magistrates, who were to hold Courts, civil and criminal, and with the consent of their associates or free inhabitants, to establish ordinances, &c.*

I should conclude that such a grant as this, proceeding from the *English* government, would have given a qualified corporate capacity to the inhabitants of *Hempstead*, sufficient to enable them to take, manage and dispose of the land, as a civil community or body corporate. And under the civil law, which is the common law of the *Dutch*, corporations, with all the usual attributes, were well known and in familiar use, and created with less ceremony and difficulty than even with us.

The grant was to the association and their *successors*, as well as heirs, for public purposes of a municipal nature. The professed objects of the grant were consistent with the design of bodies politic. There is no particular \*form of words requisite to create a corporation. A grant of a rent to a chaplain and his successors, and a grant to a body of men to hold mercantile meetings, (*Gildam mercatoriam*,) has been held to confer a corporate capacity. (10 Co. 27, 28. 30.) There are many instances of grants to the inhabitants of a town, that they should be a free borough, and enjoy various privileges which have been considered as making them a corporate body. (1 *Kid on Corp.* 52. 62, 63.)

Persons may have corporate powers, for certain specified purposes only.

So persons may have corporate powers, *sub modo*, and, for certain specified purposes only. Our laws afford numerous examples of this kind. The loan officers of a county, and the supervisors of a county, are corporate bodies; and it was

observed by the Supreme Court, in *Jackson v. Hartwell*, (8 Johns. Rep. 422.) "that there were many instances in the law of collective bodies of men, coming under one general description, endowed with a corporate capacity in some particulars expressed, but who have, in no other respect, the capacities incident to a corporation."

The several towns in this state may be considered as legal communities, or bodies politic, for certain purposes. They are authorized, at their town meetings, to make rules and regulations for the better improving of "their common lands in tillage, pasturage, or any other reasonable way," and for making and maintaining pounds, and for imposing penalties, and to raise money for prosecuting or defending the common rights of the town; and all such rules or by-laws are to be recorded by the town clerk. The common lands of the town must mean such as belong to the town, in its aggregate or corporate capacity, for the town could have no right to interfere with the tillage or improvement of private individual property.

There was nothing, therefore, unusual in this *Dutch* grant, when it conferred on the "free inhabitants" of *Hempstead*, in their collective capacity, the lands contained \*in the grant. The associates of the six patentees named, meant the free inhabitants at large.

The inhabitants of *Hempstead* held their lands under the authority of this grant, until they obtained a new patent from Governor *Dongan*, in 1685. This last patent was procured by the agents of the town, appointed at regular town meetings, and for the use of the town. This appears from the proceedings of town meetings held in *October* and *December*, 1668, and *April*, 1685. And at a town meeting in *December*, 1684, it was voted, that every person in it, possessed of any land, whether by proprietary, by purchase, or by gift, should have a right in all the commons in the township, proportionable to the lands they possessed, provided the whole town joined to procure a general patent for the whole township.

It appears that, in the interval between the two patents, lands had been granted, from time to time, to individuals, by gift, lease, or purchase, but always by the town itself, in its regular town meetings. The records are full of these grants to individuals; and the town, in its corporate capacity, exercised, as owner, a complete and uninterrupted power over the lands in the patent. Then came the patent of *Dongan*, which is the foundation of their present title. It refers to the grant of the lands of the township by the former *Dutch* patent, and grants, ratifies, and confirms, unto six patentees named, for and on behalf of themselves and their

1817.

DENTON  
v.  
JACKSON.

The several towns in this state are legal communities, or bodies politic, for certain purposes.

[\* 326]

1817.

DENTON  
v.  
JACKSON.

The English  
patent, in 1685,  
to Hempstead,  
is a confirma-

[ \* 327 ]

tion of the form-  
er Dutch patent,  
and was intend-  
ed for the same  
corporate pur-  
poses.

And the free-  
holders and in-  
habitants, in  
their town  
meetings, acted  
in their collec-  
tive capacity,  
in regard to their  
common lands,  
as well as in the  
choice of town  
officers, &c.

[ \* 328 ]

associates, the *freeholders and inhabitants of the said town*, their heirs, *successors*, and assigns, the tract of land aforesaid, *with all the privileges and immunities belonging to a town*.

I am persuaded that this patent intended to follow the other in conferring title, and did not mean to place the lands in different hands, and under a different control and succession. It professed to be a ratification and confirmation of the former grant in that particular. It defines the associates to be "the freeholders and inhabitants of the \*said town." It uses, like the other, the word *successors*, which is a well-known technical term applied to corporate succession, and it couples with the grant of the lands *all the privileges and immunities belonging to a town*. Both parties had the same object in view, the town who applied, and the government who granted.

From the date of this patent down to the division of the town, and even to this day, the control and disposition of the lands in the patent were exercised by the town, exclusively, in its regular town meetings. The uniform character of the property undisposed of by the town, was that of town commons, and not individual property. It was always governed, considered, and disposed of, as town property. The town meetings exercised, in this respect, a steady, exclusive, and unquestioned jurisdiction. The grants to individuals, even to the patentees named, as the grant, for instance, of the 23d of January, 1704, to John Jackson, were town meeting grants; and these meetings were the ordinary regular town meetings for the civil concerns of the town and the election of its officers. The title and language of the meeting were the same, whether its business was the election of a supervisor or the management of their common lands. There is no color or pretence, as the evidence strikes me, for the suggestion that the meetings acted in one character when town officers were elected, and in another character when a vote was taken touching this property. There is no such distinction to be discovered. The books of entries were all town books, and the orders were entered as town orders, by the town clerk; and we should do great injustice to the candor and simplicity of that people, if we were to suppose that any such *latent* distinction was understood or intended. I will not stay to examine any minute or unessential variation that might, perhaps, now and then, be detected in the plain untechnical journals of this town, for the space of a century and a half. It is more fit that we should determine \*the character of their proceedings from the uniform tenor and combined view of the whole.

To cite the instances in which the town, in its collective capacity, regulated and disposed of the unappropriated lands

under the patent, would be to transcribe the town records at large, from the date of the patent to the division of the town. (a) There does not appear ever to have been a question, in all their town meeting discussions, and votes, and protests, as to the *right* of the town to regulate, divide, and dispose of their common lands. The patentees and others would sometimes question the fitness, but never the authority of any resolution. This could not have been thought of, since every man in the town, who possessed lands separately, held them under that same authority. The uniform and universal understanding was, (so I construe the evidence,) that the undivided lands belonged to the town, and were subject to its exclusive regulation and disposal at town meetings. This was also the uniform practice; and, indeed, town meetings are the only legal organs through which the freeholders and inhabitants can declare their united will.

\*There were several acts of the colonial legislature, which assumed the fact as notorious and undisputed, that the common lands were the common property of the town. This was particularly the case with the acts of the 17th of *June*, 1726, and the first of *November*, 1733; and the last act is stated to have been granted upon the prayer "of the freeholders and inhabitants of the said township."

I shall not undertake to detail the parol proof. It is quite inferior to the force of the documentary evidence, since it cannot reach beyond the memory of the present generation. But even this proof is decidedly in favor of the conclusion to be drawn from the language of the records of the town.

But there is one document, which may be thought to hold a different language. I allude to the deed of *John Jackson*, of the 17th *April*, 1722. He was the survivor of the six persons, whose names were mentioned in the patent from

1917.

DENTON  
V.  
JACKSON.

[ \* 329 ]

*John Jackson*, the last surviving patentee named in the *English* patent, could not, by

(a) The town meeting votes or resolutions, which were particularly selected and mentioned by his honor, were those of the

|                      |                             |
|----------------------|-----------------------------|
| 25th January, 1686.  | 7th April, 1741.            |
| 2d November, 1686.   | 6th ———, 1742.              |
| 5th August, 1687.    | 5th ———, 1743.              |
| 28th December, 1688. | 1st ———, 1746.              |
| 1st April, 1690.     | 19th July, 1748.            |
| 24th December, 1690. | 3d April, 1750.             |
| 19th October, 1691.  | 1st ———, 1755.              |
| 15th March, 1696.    | 19th ———, 1757.             |
| 23d January, 1704.   | 31st August, 1761.          |
| 2d April, 1705.      | 1st Tuesday in April, 1764. |
| 1st ———, 1707.       | 17th June, 1765.            |
| 11th January, 1714.  | 1st Tuesday in April, 1772. |
| 5th April, 1715.     | 5th April, 1774.            |
| 3d ———, 1716.        | 1st Tuesday in April, 1779. |
| 7th ———, 1730.       | 1st ———, 1780.              |
| 6th ———, 1736.       |                             |

1817.

DENTON  
v.  
JACKSON.

his deed of the  
17th April,  
1722, enlarge  
or abridge the  
rights of the  
town to its com-  
mon property,  
under the pat-  
ent; nor could  
it limit or desig-  
nate the asso-  
ciates of the  
patentees.

**Governor Dongan.** This deed seems to have been intended by him as a declaration of trust, on the ground, probably, that the fee at law was in him, instead of being in the freeholders and inhabitants of the town. It declares who were the associates intended in the patent; and he makes them to be those who entered their lands at the time of the assessment in 1685, of  $2\frac{1}{2}d.$  per acre, to defray the expenses of procuring the patent. But this act of his, and which was probably done for greater caution, could neither enlarge nor abridge the right of the town to its common property. It could not change the associates defined in the patent itself; nor do I perceive what material operation it can have in this case, except that it destroys the notion of private individual right, and admits that he was a trustee "in the behalf of the town," and that his object was "to settle the said town in peace," and that there might be "a right understanding amongst the associates, freeholders, and inhabitants of the same." \*This deed only comes in aid and furtherance of, and is not in opposition to, the title of the town.

[ \* 330 ]

This deed attempted to do one thing which *Jackson* had not the power to do. It undertook to limit the associates from being, as they were declared to be by the patent, the freeholders and inhabitants at large, to be those only who contributed to the expense of obtaining the patent. And as this point forms one ground of the present suit, it will require some further examination.

2. It is contended, that those who contributed to that expense, and their heirs and assignees, are entitled, under some ancient vote or resolution of the town, to the undivided property, and to the aid of this Court, in compelling a division of the common lands upon that basis. This position seems to admit the title in the town, and that it is bound, in consideration of the contribution, to carry its resolution into effect.

The patent charge was paid, in the first instance, by an assessment upon the inhabitants, of  $2\frac{1}{2}d.$  an acre, according to the quantity of lands they then individually possessed. As early as 1686, the assessment had been made and partly levied, and a warrant issued for the remainder. The persons assessed were, probably, all the inhabitants who had any possessions, or were regarded as having any interest in the town; and the rate of assessment was naturally adopted as a fit rule of distribution, whenever the town came to consider the question of a division of their common lands. Thus it appears, that in *April*, 1687, there was a list of the names of the inhabitants, to the number of 160, who had made entries with the town clerk, of the amount of acres they possessed, and which were assessed at the rate afore-

said, towards defraying the expense of the patent charge. Afterwards, at a town meeting, in *February*, 1706, it was voted, that all former gifts and grants should stand good, and that if every man had not had his just right or division, (alluding, probably, to some prior division or parcel \*of their lands,) he should have it, on making his right appear to the town. It was, at this same meeting, resolved, that all the undivided lands should be divided to them that had justly paid to the patent, according to what they had paid.

This last resolution appears not to have been acted upon, and it was probably not intended to apply to the plains and beaches now in controversy. But no resolution of the kind, not carried into effect and executed, was binding upon a subsequent town meeting. It was not in the nature of a compact with certain individuals, incapable of being revoked, and susceptible of being specifically enforced. There was no mutuality in the case, and scarcely the semblance of a consideration, for the little nominal assessment that each possession had paid, say twenty years before; for the charges on procuring the patent, applied to the patent at large, which covered all their individual possessions and grants under the town. The interest that each person had in the undivided lands, was merely as being an inhabitant of the town, or, as he may be termed, in relation to the subject matter, a member of the corporation. But I consider a vote or resolution of the town to divide their common lands, upon whatever plan, as subject to modification or repeal by a subsequent vote, provided no act had been done under it, by which individual rights have become vested. It was an act of legislation over the subject; and no private right arose and became vested, unless a division was actually made and confirmed. Our statute, relative to town meetings, expressly admits, that their regulations, concerning their common lands, may be altered or revoked. It would be contrary to all precedent and principle, to undertake, in this Court, to enforce specifically such a vote. There must be a clear vested right, founded on a contract mutually binding, precise and certain in its terms, and made for an adequate \*consideration, before this Court can, consistently with any sound rule or discretion, interfere.

The deeds which the plaintiffs have produced, of sales of the interest which the grantors claimed in those commons, by purchase, or inheritance from those who had paid their assessed proportion of the expenses in procuring the patent, are no evidence of right. The individuals who trafficked in these assumed rights, may have attached value to them, under the impression that the common lands, when divided, would be divided and apportioned according to that assess-

1817.

DENTON  
V.  
JACKSON.

[ \* 331 ]

*Votes of town meetings, relative to the common property of the town, unless carried into execution, may be altered or rescinded by subsequent town meetings.*

[ \* 332 ]



1817.

DENTON  
v.  
JACKSON.

ment. But these impressions of individuals gave no new or binding force to the resolutions of the town. They remained as before, subject to any alteration, or repeal, that the town might subsequently deem meet; and I think it is very probable, that no town resolutions to divide their commons, however general in terms, which were of a date prior to 1752, were intended to apply to the plains and marshes now in controversy.

Those plains are of such great extent, and so naked and unfertile, that it is not probable they would, in those times, have been deemed worth the labor and expense of fencing and cultivating in small private farms. It is notorious that they have continued an immense waste down to this day. We find that when the town meeting, in 1723, voted that all their lands, not yet laid out, were to be divided to every person, according to what he had justly paid to the patent, they expressly excepted the plains, which were to remain in common until further orders. In *April*, 1745, the subject of the plains came again under consideration, and persons were appointed to consult whether they should be divided, or fenced from other towns. At last, a town vote was obtained, on the 30th of *March*, 1752, that the plains should be divided according to every person's right in the patent, and persons were appointed to carry this resolution into effect. The committee were to *judge and adjust men's rights, as they should appear to \*them*. Under this resolution, there were continued appropriations, for many years, not indeed of the principal part of the plains, but of small detached parcels of land around the skirts and edges of them; and these were granted to individuals, as they, from time to time, presented their claims. The quantity of land claimed and allowed, was according to the ratio, or proportion, of one acre for every 2½*d.*, or five acres for every 1*s.* of the original assessment. There is such a singular coincidence between the lands allowed and this ratio, that it could not have been accidental. In this way, the claims founded on the original assessment to pay the expenses of the patent, were probably satisfied, without having any application or pretence to the great body of the common lands. These appropriations continued to be made, down to the year 1767, and from that time forward, as I apprehend, the books are silent about any further division. This vote of 1752 was the last resolution on the subject, and this did not apply to the marshes and beaches, which are also the object of this suit, and which, together with the great body of the undivided plains, continued to be the subject of town regulations. It is a just presumption, that all claims, founded on this very ancient pretext, were presented, and passed upon, and ex-

The plains, marshes, and beaches, included within the original patent to the town of *Hempstead*, continue the common property of the town,

[ \* 333 ]

tinguished, between 1752 and 1767, and that those not exhibited (if any such there were) became obsolete, and were deemed to be abandoned.

This last effort towards a division of the plains, if it meant any thing more than to satisfy the claims, in the ratio which was adopted, had essentially failed; and, no doubt, they have been thought to be more conveniently and usefully held as corporate or common property of the town, for common pasturage, than in any other way. It is, perhaps, fortunate that the ancient grants and usages are susceptible of that construction. Judging from the past, it is \*doubtful whether the plains will be ever worth fencing into small private farms, or even of being cultivated, further than by gradual and almost imperceptible encroachments. This, however, is a question fitly confided to the inhabitants of the town.

To undertake, now, to compel a division, to satisfy any remaining outstanding claims, founded on the assessment of 1685, would (if there were no other difficulties in the way) be giving a most dangerous and unprecedented sanction to a demand, feeble in its origin, and stale from its antiquity. If ever time formed an equitable bar in any case, this is that case. The claimants amounted to 165 persons, upwards of 130 years ago, and they must, by this time, have become exceedingly multiplied and dispersed. To undertake to ascertain the certainty and extent of those claims, would be now very difficult and dangerous, if not impracticable. The true and sound remedy for such a case is, to stop the inquiry, by the application of the legal presumption that every just claim was satisfied before 1767, and that all litigation now is barred by the acquiescence and laches of parties, and by the lapse of time. I cannot conceive of a more feeble ground, than that of this assessment of 1685, for compelling a division of all the common lands of *Hempstead*, when we take into consideration its small original amount, its original object, the satisfaction it has received, and the time it has lain dormant.

I am thus satisfied, from every view of the case, that the plaintiffs, as private individual claimants, are not entitled to call for the aid of this Court to compel a partition of these lands; and I am further of opinion, that they were common undivided property, belonging to the freeholders and inhabitants of *Hempstead*, at the time of the division of the town in 1784. There is then no foundation for the present bill. The town of *North Hempstead* \*is not a party to the bill; and, therefore, it is not a question properly arising in this case, whether the freeholders and inhabitants of *that* town continued, in their new corporate capacity, to hold a share

1817.

DENTON  
V.  
JACKSON.

except such parts of the plains as have been granted by regular town meetings, to individuals.

[ \* 334 ]

The assessment of 1685, of the sums which the freeholders and inhabitants were respectively to contribute towards the expenses of obtaining the patent from the *English* governor, furnishes no ground for a partition of the common property of the town among individuals, especially after the lapse of more than a century.

The plains, &c. remained common undivided property of the town of *Hempstead*, at the time of its division into two towns, in 1784.

[ \* 335 ]

1817.

DENTON  
v.  
JACKSON.

Whether the new town of *North Hempstead* is entitled to any share in that common property? *Quære.*

But private individuals of that town cannot file a bill to settle any question relative to the common rights of the town.

in those common lands. I cannot concur in the suggestion, that any freeholder or inhabitant of *North Hempstead* may, when he pleases, file a bill in behalf of the town, and bring its common rights into discussion. In respect to property held in common, a town is a corporate body, acting by the proper organ of its will, a legally assembled town meeting. Without a resolution, recorded by the town clerk, I do not think there would be the requisite evidence of the will of a town to commence a suit respecting its rights. It appears to be altogether inadmissible, and destructive of order and peace, to admit private individuals, of their own mere motion, to carry on a suit in behalf of the town, respecting its common property, and without the knowledge and consent of the town, duly declared.

But admitting that I am mistaken upon this point, and that there are really sufficient parties before the Court, to bring into discussion the right of the town of *North Hempstead* to a share in these undivided lands, I should still be of opinion that the suit is not to be sustained. On this point, however, I wish to be understood as not giving any decided opinion, because I do not believe it to be necessary. I will merely suggest some very great difficulties in the way of the claim, if any there be, on the part of that town.

The common lands that lie within the bounds of *Hempstead*, and which belonged to that town before the division, must be under the exclusive regulation of the freeholders and inhabitants of *Hempstead*, as the inhabitants of both towns cannot assemble in joint meeting for that purpose. This exclusive power of regulation is one necessary attendant on exclusive right.

[\* 336]

The erecting of a new town, does not take away or impair the rights of the old town, in regard to its common property, unless there be some special provision in the act erecting the new town, for that purpose.

So when a new town, or a new county, is erected out of an old one, it loses its right to the use of the town property, which remains in the old town,

\*The lands belonged to the town as a community, in its corporate capacity. The erection of a new town cannot impair the rights of the old one, and the new town has none but what are given to it at the time of creating it, or subsequently. Its power is confined to its own limits, and, without some special provision, it cannot, as of course, possess any control or rights in or over lands lying within another town. Thus, for instance, if a town owned a school-house, or a poor-house, or a church, or a town-house, or a cemetery, it is not to be presumed that the new town would have any right to the use of such property, though the inhabitants of the new town may have contributed to the expense of it. Such things are necessarily local and exclusive in their enjoyment. When a new county is erected out of an old one, it loses entirely its share in the title and its right to the use of the court-house and gaol remaining in the old county, though built at the common expense.

The act dividing the town of *Hempstead* included some part of the plains in *North Hempstead*, and the greater part in *Hempstead*. If it was not intended that each town should enjoy exclusively the commons that fell within it, some express provision would probably have appeared in the law. The line of division may have been made in reference to those very commons. One part of a town may have better land, better harbors, better access to markets, and, perhaps, more wealth than another part; and when the line of division comes to be made, the parties themselves may throw the greatest part of their common lands into one scale, to balance the greater advantages in the other. Many local reasons may occur in establishing lines of division, founded on the very fact, (and which, I believe, is the general understanding,) that each town takes to itself, unless otherwise specially provided, the common lands that fall within its bounds. This is also the case when a new state is erected out of an old one. In the present instance, \*there was nothing in the act of 1784 to repel the natural and necessary inference, that each town took what common lands and common privileges fell within its limits, and no more. There was one special provision in that act, giving the inhabitants of each town, reciprocally, the right of catching oysters, fish, and clams, in the creeks, bays, and harbors of the other. This express reservation on one point, and consequent silence on all others, affords a strong presumption that no other reciprocal rights, upon each other's common rights, were intended to be reserved.

It is said, however, that in the subsequent act of 1788, being a general revised act, relative to towns, the right of each town in the common lands of the other was revived. But in answer to this, it may be said, that we can hardly presume the legislature intended to interfere with rights absolutely vested and fixed under preceding laws. We ought not to recur to this construction, if the act be susceptible of any other, and especially of one quite as easy and rational. The general proviso in the act of 1788, that "none of the bounds or lines by this act shall take away, or abridge, or affect, the right or title of any person or body politic in any manner whatsoever," was not intended to be taken in a literal sense. The act did, certainly, take away the right or title of the people of *North Hempstead* to go and vote, as they formerly used to do, at the town meetings in *Hempstead*. That right was lost, and a new one given to them by the act. Strictly speaking, the new town of *North Hempstead* had not any previous right (and it was pre-existing rights that the act alluded to) to be abridged or taken away. They were, for the first time, created a

1817.

DENTON  
v.  
JACKSON.

though acquired at the common expense of all the inhabitants, before the division; unless there is some express provision to the contrary.

Each town takes to itself, unless otherwise expressly provided, the common lands that fall within its bounds.

[\* 337]

The general revised act of 1788, relative to towns, made no change in the law in this respect.

1817.

DENTON  
V.  
JACKSON.

[\* 338]

town or body politic, with a right to regulate their own common lands, but not the lands of others. To say that the town of *North Hempstead* have no right or share in the common lands within the bounds of *Hempstead*, is not taking away, or abridging, any of their rights; for, as a \*town, they never had such a right. That saving clause, therefore, has nothing to do with this question.

It is further understood, that so far as the plains fell within the bounds of *North Hempstead*, the inhabitants of that town have acted, as to them, as well as to their other town property, as if each town owned exclusively its own commons. This appears from their town meeting resolutions, from *April*, 1785, to *April*, 1808. They have not only put that construction upon the act, but there is evidence to infer an adverse exclusive possession of the commons in *Hempstead*, by the town of *Hempstead*, for 20 years after the division, and before the filing of the bill. If so, this would, probably, form a legal bar to their claim, however otherwise well founded. A prescription of 20 years will bar a claim to a right of common.

These are some of the difficulties which have arisen in my mind as to a claim on the part of *North Hempstead*, if they were now a party to the suit. But I have not formed, and wish not to express, any decided opinion on this point. It is sufficient, in this case, that the plaintiffs, as individual claimants, have no title; and the bill must, consequently, be dismissed, with costs.

Bill dismissed.

1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

\*A. & J. UNDERHILL *against* VAN CORTLANDT and others.

VAN CORTLANDT and others *against* A. & J. UNDERHILL.

The deposition of a witness, whose examination was not closed until after publication had passed, was allowed to be read, he having been cross-examined by the opposite party, and no actual abuse appearing; but such practice is irregular.

A witness should go before the *examiner*, free to answer all interrogatories, and not with a deposition already prepared.

If a *cross* bill contains a charge of fraudulent misconduct in arbitrators, but no such allegation is made in the *answer* to the *original* bill, though by a general order of the Court, the depositions taken in the *original* suit are allowed to be read in the *cross* suit, yet such parts of those depositions as relate to the fraudulent misconduct, not charged in the *original* suit in which they were taken, will be suppressed.

Proof taken in a cause must be pertinent to the issue in that cause; *secundum allegata*.

What misconduct of arbitrators is a sufficient ground for setting aside an award.

Where a lease contains a covenant, that the mills and other buildings erected on the premises, by the lessee, should, at the end of the term, "be appraised and valued, by two persons indifferently chosen by the parties, and in case of their disagreement, by a third person chosen by the two;" a nomination by each party of one appraiser, with the assent of each to the nomination of the other, is binding on them, and a compliance with the covenant.

Where an *umpire* is chosen by two arbitrators, and they join in the *umpirage*, it is good; for the *umpire* may take what advice or assessors he pleases.

If there is no corruption or partiality in arbitrators, nor any misconduct during the hearing, nor any fraud practised by either party, the award is binding and conclusive, and cannot be set aside by the Court, however unreasonable or unjust the award may appear.

Where a defendant puts in an answer instead of demurring to the bill, and the cause comes on to be heard, upon the merits, it is too late to object to the jurisdiction of the Court, on the ground that the plaintiff has adequate remedy at law, which he might have pursued.

THESE were *original* and *cross* suits. The *original* bill, filed the 30th of *September*, 1813, stated, among other things, that the defendants in that suit, on the 18th of *February*, 1792, by indenture, leased to *Robert Underhill* and to the plaintiffs, *Abraham* and *Joshua Underhill*, and to *Thomas* \*and *William Burling*, a mill-place and land, at *Croton*, of 70 acres, for the term of 21 years from the 1st of *May*, 1792, at the annual rent of 40 pounds a year; and it was covenanted, "That the lessees might, at their discretion, build any mills and other buildings on the premises, during

January 27th.

[ \* 340 ]

1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

the term, and cut down and use for building, as aforesaid, good timber within two miles of said premises, and the lessor would show where the same was to be cut." "That at the expiration of the term, the mill or mills then standing, and whatever might appertain thereto, should be appraised or valued by two persons indifferently chosen by the parties, and in case of their disagreement, by a third person, to be chosen by the two, and the said appraisement should be binding on the parties; and the lessors should pay to the lessee the amount of the appraisement, deducting only from the same the value of the timber which the lessors should find as aforesaid, as it was then standing; and that all other buildings, then standing on the premises, should, in like manner, be appraised, and the amount, not exceeding 200 pounds, should be paid to the lessees by the lessors," &c.

Owing to some *mistake*, the plaintiffs did not execute the lease, yet they accepted the same with the other lessees, and were equally concerned in the same, and were so considered by the other lessees, and by the lessors. The lessees took possession of the demised premises, erected a mill, built a dam, built a dwelling-house, barns, and other out-houses, and paid rent, &c.

*Thomas and William Burling*, on the 5th of *February*, 1799, sold and released their interest in the lease to *Robert Underhill* and the plaintiffs; and, in *April*, 1804, *Robert Underhill* sold and released all his interest in the premises to the plaintiffs.

On the 1st of *May*, 1813, the plaintiffs and defendants mutually chose *Nathan Anderson* and *Samuel Mott*, appraisers of the mill and buildings under the lease; and \*the appraisers met and examined the mill, &c., but not being able to agree on their value, they chose *David Lydig* to be the *third* person, or umpire, to whom no objection was made by either party. *Anderson* and *Mott*, with the consent of the defendants, agreed to adjourn their meeting until *Lydig* could attend. On the 8th of *July*, 1813, the three appraisers, with the parties or their agents, met on the premises, and viewed the mills, buildings, &c., in presence of the parties or their agents, and having heard the parties, made their appraisement in writing, under seal, by which they valued the mills, and whatever was appurtenant thereto, belonging to the plaintiffs, at 18,000 dollars, and the other buildings thereon, exclusive of the timber furnished by the defendants, and the movables thereon, at 500 dollars. The award was executed by the three appraisers, and a copy delivered, on the same day, to each of the defendants, and a copy to the plaintiffs. The plaintiffs then offered to surrender up the premises to the defendants, on being paid

[ \* 341 ]

the amount of the sum or value so awarded, and to allow 200 dollars for the timber used, but the defendants rejected the offer, and refused to pay the amount of the appraisement. That, notwithstanding such refusal, the plaintiffs, on the 15th of *August*, 1813, delivered up the possession to *T. C. Van Wyck*, the agent of the defendant *Pierre Van Cortlandt*, by delivering to him the keys. That *Philip Van Cortlandt* pretended that he had no interest in the premises, and that they belonged wholly to the other defendant, *Pierre Van Cortlandt*, and that, though he joined in the lease, he was not bound to pay the appraisement. The plaintiffs charged that both the defendants were equally bound to pay the appraisement, deducting the value of the timber; and prayed that the defendants might be decreed to pay to the plaintiffs the 18,000 dollars, with interest thereon from the 1st of *May*, 1813, and 500 dollars for the \*other buildings, with interest, deducting the value of the timber cut and used for building, to be accounted for, as the Court might direct, with costs, &c.

The defendants, in their answer, filed the 10th of *January*, 1814, admitted most of the facts charged in the bill to the year 1813, and stated various matters relative to the choice of appraisers, their conduct, and the award, on account of which they alleged the valuation to be erroneous, excessive, and void.

The bill in the *cross* suit was filed the 23d of *June*, 1815, by *Philip Van Cortlandt*, and four others, all children of *Pierre Van Cortlandt*, one of the defendants in the original suit, who died the 1st of *May*, 1814, and his devisees, and three of them executors of his last will, against the plaintiffs in the original suit, and *Anderson*, *Mott*, and *Lydig*, the three appraisers.

The *cross* bill stated the death of *Pierre Van Cortlandt*, &c., and the lease made in his lifetime. It alleged various matters relative to the premises leased, the conduct of the lessees, and the behavior of the appraisers, to show that the appraisement was not fairly made, and that the valuation was unreasonable and excessive; that since the lessors answered the original bill, and before publication, the testator died; that a bill of revivor and supplemental bill had since been filed against the plaintiffs, &c. The bill prayed for a *discovery* of the matters alleged, that the appraisement might be set aside, and the value be ascertained in some proper way; that the plaintiffs may be allowed to set off, against the valuation, their damages for *waste*, committed by the lessees, &c., the value of timber cut and carried away, to be ascertained in some proper way, &c.

The plaintiffs in the original suit put in their joint answer

1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

[\* 342]



1817.  
  
 UNDERHILL  
 v.  
 VAN CORT-  
 LANDT.  
 [\* 343 ]

to the cross bill, and the three appraisers answered separately; but, by an order of the 27th of May, 1816, the \*bill was amended, and *Anderson*, one of the defendants, was struck out.

A great number of witnesses were examined on both sides, in the *original* suit, and, by an order of the Court, the depositions taken in the *original* suit were allowed to be read in evidence at the hearing in the *cross* suit, except the deposition of *Anderson*, one of the appraisers, whose name had been struck out of the bill in the *cross* suit, in order that he might be examined as a witness.

The allegations in the pleadings, and all the material parts of the evidence, in both suits, are so fully stated in the opinion delivered by the Court, that any further statement of them here is unnecessary.

Both suits came on to be heard, and were argued together, on the 28th of *October* last.

*Riggs*, for the plaintiffs in the *original* suit, and for the defendants in the *cross* suit.

*T. A. Emmet*, and *P. C. Van Wyck*, contra.

*January* 20th.

The cause stood over for consideration to this day, when his honor the chancellor being about to deliver his opinion, the counsel for the plaintiffs in the *cross* suit presented a *petition*, stating that the plaintiffs had concluded that it would be more eligible for them, instead of paying the 18,000 dollars, at which the mills, &c. had been valued by the appraisers, to release the premises to the defendants; and they therefore prayed a decree that they might release the premises, in fee, with the land on which the mills, &c. were erected, and such quantity of land adjacent as might be necessary to the free and full enjoyment of the premises, within such limits, &c. as the Court should deem reasonable, &c.

[\* 344 ]

\*THE CHANCELLOR said he would defer giving a decree in the cause until the counsel for the plaintiff, in the *original* suit, would have an opportunity of communicating the proposition contained in the petition to their clients, and obtain their answer.

*January* 27th.

THE CHANCELLOR. The *original* suit between these parties was brought to enforce the performance of an award, and the *cross* suit was for the purpose of relief against it.

The sum awarded on the valuation of certain property, was 18,500 dollars, and this has been deemed by the party  
 268

against whom it was awarded, as an excessive valuation. A variety of objections have, accordingly, been taken to the proceedings of the arbitrators, which have necessarily led the parties into voluminous pleadings and proofs, and it now becomes my duty to give to these objections all the consideration and discussion to which they may be entitled.

The misconduct of arbitrators is one ground for setting aside an award. The misconduct charged in this case is principally from the refusal to hear evidence offered by one of the parties, and from holding a private and *ex parte* communication on the subject before them with the opposite party.

1. As to the rejection of evidence.

The cross bill charges that *Theod. C. Van Wyck*, the agent of *Pierre Van Cortlandt*, one of the defendants in the original suit, informed the appraisers before they made their award, that "he had material testimony to submit respecting the matters submitted, and that *Lydig*, one of the appraisers, declared he could not wait to receive the testimony, and this declaration was not opposed by the other appraisers, and in consequence of that declaration the testimony was not produced." The same charge was made by the defendants in the answer to the original bill.

\*In support of this charge, *Anderson*, one of the arbitrators, was examined, who stated, that before they finally retired to deliberate, *Van Wyck* "offered some evidence which *Lydig* refused to hear, telling him that he did not think the appraisers were bound to receive any." The next witness, in support of the charge, is *Van Wyck*, the person who offered the testimony: he says he offered "to bring witnesses to prove that the raceway would not cost, at the present rate of wages, more than 1,000 dollars. That *Lydig* replied, that he could not wait to receive such evidence. That *Van Wyck* then offered to go into the evidence immediately, and no answer was given by either of the arbitrators, which he considered a refusal."

An objection has been raised to the competency of the deposition of *Van Wyck*, on the ground that his examination was not closed by the examiner, until after publication had passed. The examiner certifies, that it commenced on the 28th of *June*, and was continued to the 5th of *July*. How this irregularity arose does not appear, nor is it suggested that any actual abuse has arisen in consequence of it; and the witness was cross-examined on the part of the *Underhills*, in the same way. I do not incline to suppress the deposition, and deprive the party entirely of the benefit of *Van Wyck's* testimony. It would seem to be too rigorous, when the other party has had the benefit of a cross-examination, and has not raised the objection until the hearing, when no

1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

[\* 345 ]

The deposition of a witness whose examination was not closed until after publication had passed,

1817.

UNDERHILL  
v.  
VAN CORT-  
LANDT.

was allowed to  
be read, he hav-  
ing been cross-  
examined by  
the opposite

[ \* 346 ]  
party, and no  
actual abuse  
appearing.

A witness  
should go before  
the examiner,  
free to answer  
all interrogato-  
ries, and not  
with his depo-  
sition already  
prepared.

re-examination can be had, and when no ill use is stated to have been made of the irregularity. The question whether the deposition shall be suppressed is a matter of discretion; and in *Hammond's case*, (*Dickens*, 50.) and in *Debrox's case*, (cited in 1 *P. Wms.* 414.) the deposition of a witness examined after publication, was admitted, in the one case, because the opposite party had cross-examined; and in the other, because the testimony would otherwise have been lost forever.

\*The deposition of *Anderson* is also objected to.

The order allowing depositions taken in the original cause, to be read in evidence in the cross cause, excepted that of *Anderson*, and he was, consequently, examined in the cross cause; but how was he examined? By copying his deposition in the original cause. He went, therefore, before the examiner with a prepared deposition. This is against the course and policy of the Court, and it would lead to the most dangerous practices. The witness ought to go before the examiner, as Lord *Coke* observes, (4 *Inst.* 279.) "untaught, and without instruction." He should be free to answer the sifting interrogatories that are framed for the issue in *that case*, instead of merely filing an affidavit ready drawn. I should, undoubtedly, be justified in totally suppressing the deposition of *Anderson*, in the cross cause, if I was to follow the strict rule of authority. (*Amb.* 252. *Anon. Shaw v. Linsey*, 15 *Vesey*, 380.) If I have allowed it to stand, in consideration of the regularity of the original deposition, I hope it is an indulgence that will never be abused.

In opposition to the evidence of *Anderson* and *Van Wyck*, we have the answers of *Abraham I. Underhill*, *Mott* and *Lydig*, who give a full explanation of the fact. They all separately state to this effect; "that after the appraisers had heard the allegations and proofs of the parties, and had conferred together, *Van Wyck* came into the room, and offered to produce witnesses, to prove the actual cost of the dam and raceway; that the witnesses were not present, and *Lydig* told him, with the acquiescence of the other two appraisers, that such testimony was not material or relevant, as the inquiry was not what the works had cost, but what they were then worth; and they all deny that *Van Wyck* offered any other testimony, or to any other point."

*Mott* and *Lydig*, in their depositions, taken in the original cause, equally disprove the allegation of a refusal to hear \*testimony. *Lydig* says, the appraisers did not refuse to receive further testimony offered, or ready to be offered, by either party, as long as it appeared to have any bearing on the appraisement; that no witnesses were offered to prove

[ \* 347 ]

the cost or value of the premises, and if either party had requested further time for that purpose, the appraisers would have allowed it. *Mott* also testifies, that the parties were asked if they had any thing more to offer or produce, and they said, nothing further; that *Van Wyck* asserted, in the room, that the mill-dam had not cost as much as the plaintiffs had intimated, and *that* could be shown as a fact, and he urged the appraisers to take it into consideration; and they answered, that it was their business to value the property according to its present value, and not at its original cost.

It has been said, that there is some variance between the depositions of *Mott* and *Lydig* in the original cause, and their answers in the cross cause, but I do not perceive it. Their depositions are, indeed, more general than their answers: this, probably, arises from the particular and sifting nature of the charges and interrogatories in the cross bill. The only expression that even looks contradictory, is one of *Lydig's*, in his deposition, that no witnesses were offered to prove "the cost or value" of the premises. But I think we are bound, in all candor, to conclude, that the word *cost* was here used as synonymous with the word *value*, with which it is coupled, because, in his answer, he explains fully the offer as to the original cost.

It appears to me, then, to be a just and necessary conclusion, from this proof, that the only testimony offered by *Van Wyck* was that relating to the original cost of the dam and raceway. The weight of evidence is decidedly against any other conclusion. *Van Wyck* stands alone against the answer of *Underhill*, and the answers and depositions of *Mott* and *Lydig*. I say, he stands *alone*, for the deposition \*of *Anderson* is general, and does not state what was the nature of the evidence offered, or to what point, and it may as well relate to the original cost of the works as to any other object. His testimony may be rendered consistent with that of the other appraisers.

It cannot surely become a question, whether evidence of the cost of a dam and raceway, built 21 years before, was material in an inquiry as to their existing value. There could be very little, if any, analogy, between the original cost and the present value, considering the space of time which had intervened, and the great variations in prices, labor and business, and many other circumstances connected with such works. I doubt, whether any Court of justice would have deemed such evidence, in such a case, pertinent. Instead of being useful in guiding the judgment, it would probably have been delusive or injurious. There was then no misconduct, or even the want of due discretion, in the arbitrators, in expressing a disinclination to wait until such

1817.

UNDERHILL  
V.  
VAN CORT  
LANDT.

[ \* 348 ]

What misconduct of arbitrators is a sufficient ground for setting aside an award.

1817.

UNDERHILL  
v.  
VAN CORT-  
LANDT.

immaterial, if not absolutely improper, testimony, might have been hunted up and produced.

2. Another charge is, that the appraisers held a private and *ex parte* communication with *Abraham I. Underhill*, while they had the subject under deliberation. This charge is made in the answer to the original bill, and also in the cross bill, and the proof of it rests upon the single uncorroborated deposition of *Anderson*. He says it was proposed by him, the witness, to call in *Underhill*, to ask him what money was laid out on the mill, dam and raceway, and that he was alone in the room, when the question was put to him, and that he stated that the plaintiffs had laid out 20,000 dollars.

[ \*349 ]

In answer to this charge, *Underhill* states, that he was called into the room, where the appraisers were deliberating, and that *Thomas Van Cortlandt* and *Van Wyck* went in with him, and that some question was asked him by *Anderson* relative to the cost of the dam and raceway, and he answered he did not know, as no separate account thereof was kept, but only an account of the costs of the whole works : and he denies that he had, at that or at any other time, any *ex parte* or private communication with either of the appraisers on the subject of the appraisement, while the same was under deliberation. The answers of *Mott* and *Lydig* state, that *Underhill* was sent for to obtain some information relative to the mill of *Thomas Van Cortlandt*, which was also submitted to their appraisement, (though unconnected with this controversy,) and that *Van Cortlandt* was sent for at the same time, and was present with *Van Wyck*, and they have no recollection, and one of them says, no belief, of any question being asked relative to the cost of the dam, raceway, &c. ; and they deny that any of the appraisers held any *ex parte* or private conversation or communication with him, in the absence of the other parties.

The weight of evidence is clearly against the charge. The question which *Anderson* put to *Underhill*, was not put by the direction or sanction of the board ; it was when the other party was present, and no answer was given communicating any thing material. It would be very unjust, and altogether unprecedented, to allow such a circumstance to affect the validity of the whole proceeding ; and it may be proper to observe, in this place, that the credit of *Anderson*, as a witness, is extremely impaired by his own confessions and conduct. He is called as a witness to impeach his own award and his own integrity ; and this case falls within the reason and policy of the rule at law, (4 *Johns. Rep.* 487. 4 *B. & Pull.* 326. 4 *Binn.* 150. 1 *Hen. & Munf.* 385.) that the affidavit of a juror is not to be received to impeach his

verdict, because it would expose jurors to dangerous practices, and to be tampered with by the losing party. In this case, *Anderson* is alleging his own turpitude. He says, that *Mott* and himself never did confer together and disagree, before they appointed *Lydig*, and he avows that he acted with bad faith and duplicity, when he \*signed a report, that they *had* compared opinions, and *had* found it necessary to choose a third person, and when he told the parties that they two *had* disagreed in opinion, and when he signed the award, declaring it be "according to his best judgment and belief." Can he be entitled to credit, when he comes now and declares that he acted the hypocrite in all those transactions? It is one of the maxims of the common law, (4 Co. Inst. 299.) that *allegans suam turpitudinem non est audiendus*.

3. Another charge of misconduct in the arbitrators is, that they did not examine the premises with sufficient accuracy to enable them to form a correct and just estimate of the value. *Anderson* says this himself, though it does not appear that he made any objection at the time, or required for himself, or solicited from his associates, a more particular examination. *Van Wyck*, the agent of *Van Cortlandt*, is of the same opinion, though he was present at the view of the two appraisers, in *May*, and by all three of them in *July*, and was active in showing and pointing out the state of the works. Some of the by-standers, as the two *Fowlers*, were of the same opinion; and one of them was surprised that the arbitrators did not make inquiries of him. But the other two arbitrators, *Mott* and *Lydig*, declare that they did make a careful, particular, and satisfactory examination. *Mott* says, that he and *Anderson* examined the works in *May*, for two days, and about two hours each day; that it was a careful examination, and that the works were examined by all of them, in *July*, with particular attention; that the works were viewed, at both times, in a careful and satisfactory manner; and he details a number of particulars. *Lydig* declares the same thing. It was for the arbitrators to judge whether their examination was sufficiently minute and particular to satisfy their minds. It was a matter resting in their sound discretion. It would be impossible for any Court to prescribe \*a precise rule on this subject. It must rest entirely in the judgment and integrity of the men selected by the parties. What puts this point beyond all doubt or difficulty, is the fact, that the parties, by themselves or their agent, were present, and conducted the view. They should have directed the appraisers to more particulars, if they wished it, or thought it necessary. They must have deemed the examination sufficient, or they would have pointed to objects for more minute inspection, and have called upon the appraisers

1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

[ \* 350 ]

[ \* 351 ]

1817.

UNDERHILL  
v.  
VAN CORT-  
LANDT.

for a more accurate survey. The appraisers were not only satisfied themselves, but they had every reason to conclude, that the parties were satisfied also. If the parties were not, they should have spoken at the time, when the remedy could have been provided. It is inadmissible to set up the pretext now; and it appears to me, that no award was ever assailed by a more unreasonable and groundless objection.

4. Another class of objection goes to the legal and technical form of the proceedings.

It is said, that *Anderson* and *Mott* were not duly appointed, in the first instance, because each of them was not selected and appointed by both parties, but each party separately selected a man.

The words of the lease were, that the mills, &c. were to be appraised or valued "by two persons indifferently chosen by the parties, and in case of their disagreement, by a third person, to be chosen by the two."

Where a lease contained a covenant that the mills and other buildings erected on the premises by the lessee, should, at the end of the

[ \* 352 ]  
term, be "appraised and valued by two persons, indifferently chosen by the parties, and in case of their disagreement, by a third person chosen by the two," a nomination by each party of one appraiser, with the assent by each to the nomination of the other, is binding on them, and a compliance with the covenant.

The usual construction of such covenants is the one adopted by the parties, of each nominating a person. The *Van Cortlandts* were the first to put that construction upon the lease, by commencing with the nomination of *Anderson*, and informing the *Underhills* of it: they then, on their part, nominated *Mott*, and no objection being made, by either party, to the person nominated by the other, the two appraisers were received and acknowledged by both parties, as duly appointed. Under this acquiescence and ratification, the appraisers became "chosen by the parties," within the meaning of the covenant; and it is impossible that either of them can now be permitted to say that the two appraisers were not properly chosen. A nomination by each, with an assent to each other's nomination, is as reasonable and fair a construction as could have been adopted.

It is, again, said, that the two appraisers had not "disagreed," so as to have been authorized to choose a third person. But it is admitted, that, after devoting part of two days to the inspection of the premises, and conversing together on the subject, the two appraisers told the parties they had disagreed and could not agree: they also signed a writing in which they stated, that they had examined the premises for part of two days, and compared opinions as to their present real value, and found it necessary to choose a third person. What further evidence of disagreement could have been required or given, than the solemn declaration of the appraisers themselves? It is true, *Anderson* now declares all this to be an imposition and falsehood practised upon the parties; but can he be heard in such an allegation, or is it worthy of any credit?

After a party has discharged his trust, can he, at any time, vacate all his acts, by declaring that they were not done in sincerity? If this was to be tolerated, there would be no certainty or safety, either in the administration of justice, or in the ordinary business of mankind. But *Mott*, the other arbitrator, contradicts this assertion of *Anderson*: he says, that, after viewing the works, he and *Anderson* did confer together about the value, and did disagree in opinion touching the value; that they mentioned widely different sums, and that there did not appear to be any rational prospect of their agreeing, and so he was led to believe; \*and, in fact, that they did not, and were not able to agree.

This testimony puts an end to all further question on this point.

It is further said, that *Lydig* was chosen to assist the other two, and was not chosen as an umpire to decide, independently, by himself, as he ought to have been, according to the intention of the covenant.

The answer to this objection is, that *Lydig* was chosen with the consent and wish of all parties, to act with, and assist the other two appraisers, rather than to act alone. All agreed in that construction of the covenant, and the appraisalment was accordingly so conducted. This is a conceded fact, and the parties must be deemed to have concluded themselves, by their own free consent and agency, from setting up any other construction, for the purpose of defeating the award. It would be both unreasonable and unjust. But if *Lydig* ought to have been chosen, and to have acted strictly as an umpire, still the act is valid, for the association of the other two appraisers with him in viewing the premises, in consultation, and in the award, does not vitiate the award by him as umpire. It is settled in the case of *Soulsby v. Hodgson*, (3 Burr. 1474. 1 Blacks. Rep. 463.) that if the arbitrators join in the umpirage, it does not vitiate it. The umpire may take what advice or assessors he pleases. It is still the umpirage of the umpire only. The same observation was made by Lord *Albanley*, as master of the rolls, that "an arbitrator might make use of the judgment of another, upon whom he could depend, and the valuation of that person is his, if he chooses to adopt it."

There is a charge in the cross bill, though there is none in the answer to the original bill, of fraudulent practices by the *Underhills*, in procuring the award. The charge is, that they covered the cogpit, and part of the raceway, \*with boards, and part of the garret floor of the mill with meal, to conceal defects from the observation of the appraisers.

The proof of this charge is to be found in the testimony of *Walter* and *William Fowler*. The first of them states, that

1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

[ \* 353 ]

Where an umpire is elected by two arbitrators, and they join in the umpirage, it is good, for the umpire may take what advice or assessors he pleases.

[ \* 354 ]



1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

between the first of *May* and *July*, 1813, the *Underhills* covered certain decayed parts of the mill with boards and shingles where it leaked; and the floor on which the water had leaked was strewn over with meal and bran, by *Abraham Underhill*, but whether for the particular purpose of hiding the marks on the floor or not, he does not know. The other witness states, that on the day of the expiration of the lease, *Abraham Underhill* drove some shingles into the roof, it having rained the day before, and the water leaked through upon the floor, and in order to hide the marks, he strewed meal or flour on it, and then had the floor swept; that he laid planks over the plate of the flue, which was decayed, and which had never been covered before, by which means the decayed parts were concealed; that this was done only one or two days before the expiration of the lease; and that, between the 2d of *May* and 8th of *July*, boards were nailed up against the cogpit, though there was an inside door to admit persons into it, which was not fastened.

An objection was made to the competency of this proof. The depositions, though admitted to be read in the cross cause, were taken only in the original cause, which contained no such charge of fraudulent concealments, and, therefore, the proof was *dehors* the pleadings, and not relative to any matter then in issue; and that though the depositions in the original cause were, by a general order, allowed to be read in the cross cause, yet the order never could have intended to render valid such parts of the depositions as contained matter not properly admitted when the depositions were taken.

[ \* 355 ]

It is, likewise, objected to the cross bill, that it ought not \*to contain new matter, not set up as a defence in the original cause, unless it be new matter subsequently arising; for it is intended only in aid of the defence to the original suit, and cannot be more extensive than the original defence. This is, undoubtedly, the general principle; but I am not clear that the cross bill may not set up additional facts, as constituting part of the same defence, relative to the same subject matter. The first objection strikes me as more weighty; and I am of opinion that, upon sound rule, the matter improperly admitted in the depositions in the original cause, continues equally improper when the depositions are used in the cross cause; and that if the plaintiffs in the cross cause wished to avail themselves of that matter, they ought to have had the witnesses re-examined. Proof taken in a cause should always be pertinent to the issue in that cause; *secundum allegata*. The opposite party is not to be supposed to have filed his cross interrogatories with any other view; and he

Proof taken in a cause must be pertinent to the issue in that cause, *et secundum allegata*.

is deprived of the benefit of an examination on his part to such new matter.

I am of opinion, therefore, that all such parts of the testimony taken in the original cause, as related to the misconduct of the party, ought to be suppressed: this will leave the charge in the cross bill totally without proof. There were no witnesses examined in the cross cause, except *Anderson*, and he proves nothing on this point.

But if we take this new matter into consideration, *ex gratia*, and in order to view the case in every possible light, how does the proof stand?

*Abraham I. Underhill*, in his answer, denies that he ever used any means whatever, directly or indirectly, to conceal from the appraisers the real state of repair of the works. He says, that it became necessary to close the business, and clear the mill of flour and other property, so that the premises might be in a proper state and condition for delivery to the lessors, at the expiration of the term, and as soon as they should be valued, &c.; that the works accordingly ceased to be used, and the milling business was brought to a close, about the last of *April*; that he directed the side of the cogpit to be boarded up, through which persons might otherwise have entered; and the mill was otherwise fully secured to prevent the machinery from receiving injury from evil-minded persons, and to preserve it, and for no other purpose. He says, further, that a short time before the expiration of the lease, and while engaged in repairing the mill, he caused the bridge and platform across the raceway to be repaired, and some boards were laid down, and used in repairing the same, and a passage-way to the gates of the raceway. He denies that any boards or plank were laid down, except as aforesaid, or that the appraisers were thereby prevented from inspecting that part. He further admits, that part of the roof leaked in several places, and that he directed small quantities of bran or shorts to be placed in certain spots or places on the floor, under the roof where it leaked, which had been the constant practice from the time the leaks were discovered, to absorb the water; and he thinks it probable there might have been small quantities of bran or shorts on the floor, when the appraisers were there; but he denies, that any thing of this kind was done to conceal the real situation of the roof.

This is a plain and probable solution of the motives which led to the repairs, from which so harsh a conclusion has been drawn. It is to be observed, that neither of the witnesses charge any fraudulent designs in the repairs; and, certainly, the inference of fraud is not a necessary one: it might as well be applied to any repairs whatever, made near

1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

If a cross bill contained a charge of fraudulent misconduct in arbitrators, but no such allegation is made in the answer to the original bill, though, by an order of the Court, the depositions taken in the original suit are allowed to be read in the

[ \* 356 ]  
cross suit,—yet such parts of the depositions as related to the fraudulent misconduct, not charged in the original suit in which they were taken, will be suppressed.

1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

[\* 357]

the termination of the lease. The works were still open to public inspection, and the opposite party must have seen and known of all these repairs, at the time of the examination. They were before their eyes, and there was no complaint made, at the time, by the inspectors, to \*the opposite party or their agent, of any impediment thrown in the way of a fair and full inspection. On the contrary, *Mott* says that the inspectors satisfactorily examined the machinery in the mill; that the side of the cogpit was boarded up, and which he understood at the time was done to prevent the machinery from being injured, after the *Underhills* had ceased to use it. That he and *Lydig* went into the cogpit below, under the machinery, and viewed it. That there was a bridge or platform across the raceway, and some boards laid down, but nothing to prevent the raceway from being fully examined; and that the inspectors or some of them, did inspect the raceway, as well in that part where the bridge and boards were laid, as in the other part. *Lydig* gives, essentially, the same statement. It would be extremely unjust to draw the conclusion of a fraudulent concealment, from circumstances susceptible of so easy and reasonable an explanation, and which were, at the time, within the view and knowledge of the appraisers and the opposite party, and which were, moreover, not at all injurious; for they did not, in the judgment of the arbitrators, prevent a full and satisfactory inspection.

[\* 358]

The only serious part of the charge, according to the testimony of the two *Fowlers*, is the sprinkling of meal on the garret floor, to hide from the inspectors the knowledge that part of the roof had leaked. This really appears to me to be too trivial and too improbable a story to deserve notice. It cannot be supposed that men who had been for many years engaged in great and enterprising business, and whose characters have not, in any degree, been assailed, should have resorted, and that, too, in the very presence of their own miller and his son, to so mean and paltry a fraud, merely to conceal so insignificant a defect as a leak in the roof, and that, too, for the purpose of enhancing the value of their buildings. But the proof here abundantly repels any inference of fraud. *Mott* and *Lydig* both declare, \*that while they were in the garret of the mill, they were informed (and one of them says it was by the *Underhills*) that the roof leaked in some places, and their attention was accordingly drawn to the circumstance; and they saw stains on the floor, but nothing to prevent it from being sufficiently and satisfactorily examined. *Anderson* says, he also understood, at the time, that the roof was leaky, and he did not observe that meal was strewed on the floor.

6. I come, now, to the real foundation of this controversy, and that is the sum at which the mill and its appurtenances have been valued. The other points on which I have hitherto dwelt, have been seized upon by the dissatisfied party, rather, I presume, as auxiliary to the great object of opening the award, on account of the alleged extravagance of the valuation. The question of valuation of property is, indeed, one on which it is almost impossible to give satisfaction. The judgments of men will differ exceedingly on this fluctuating subject. Lord *Alvanley* has observed, that "valuers differ so much, that it is not very wise to agree to sell according to the valuation of any one." My impression, from the proof is, that the property here was considerably overvalued; and I have been induced to examine the case with more than ordinary attention, to see if there was any well-established fact that would, upon sound principle, justify me in interfering with the award. But if I have been unable to discover any such sufficient ground, it is then my indispensable duty to adhere to the settled doctrines of the Court, rather than make them bend to a case of individual hardship. I am no more at liberty than any other Court, to follow my own wishes, in opposition to general principles; nor ought I to give undue importance to small circumstances, or exaggerate trifles, merely to aid a particular case, when, in any other case, it would not be permitted. This case, \*like all others, must stand or fall upon the application of the general doctrines of the Court.

It has been made an objection to the damages awarded, that the arbitrators included, in their estimate of the value of the mill, the value of the right which the lessees had acquired of using *Evans's* patent machinery for the manufacture of flour. I cannot perceive any objection to that right being a subject of estimate. The arbitrators were to appraise not only the mill, but "whatever might appertain thereto;" the machinery erected in the mill under that patent, was protected by it, and the right of using it was an appurtenant, without which the machinery might have been useless. That right must, of necessity, pass with the property in the mill, and whoever succeeded to the right of the mill, took the machinery with it, and the right attached to that machinery. The right was so far, of course, assignable. It belonged to that machinery, at that place, whoever might be the occupier. The right must have that construction; and there is nothing appearing in the case, to show or even to raise a presumption, that the license was useless, or of no legal validity. There is no evidence to show that the machinery erected in the mill, under that patent, was erected between the expiration of the old, and the issuing of a new patent, under the

1817.

UNDERMILL  
V.  
VAN CORT-  
LANDT.

Valuation of  
property by ap-  
praisers chosen  
by the parties.

[ \* 359 ]

1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

act of January, 1808, or that the case of *Evans v. Jordan*, (9 *Cranch*, 199.) has any application. The machinery, we must presume, was, therefore, properly estimated as it then existed.

It is also objected, that the timber cut down and used by the lessees, in the buildings, was not assessed and deducted from the value of the mill and other works; but it is a sufficient answer to this, that the covenant for the arbitration did not extend to any other subject than the mills and their appurtenances. The timber was to be deducted from the amount of the appraisement, and not to form a part of it. The deduction was to be made by the parties, \*after the amount of the valuation had been ascertained. Indeed, the *Underhills* assert, that it was proposed by them, that the appraisers should, at the same time, include the timber used by them, and that the proposition was rejected by the other party. Whether this was so or not, it was at least the duty of the *Van Cortlandts* to have tendered proof on that point to the appraisers, if they wished that the timber should have been assessed at the same time. The subject was totally waived by themselves.

[\* 360]

Another objection has been raised against the mode of assessment, inasmuch as the appraisers did not, in their deliberations, assess each particular article, in the mill and its appurtenances, separately. But this was a matter resting in the discretion of the arbitrators. There was no rule of that kind prescribed for them, and their judgments were left free to adopt such a mode of valuation as would, in their opinion, lead to a satisfactory result. In fact, the two appraisers, *Mott* and *Lydig*, both declare, in their answers to the charge of this kind, that they did separately value the *items* of the property under appraisement, which were of any magnitude and importance, and sufficiently so to form a correct and just estimate of the whole. In the case of *Dick v. Milligan*, (2 *Vesey*, jun. 23. 4 *Bro.* 117.) the same objection was taken. The arbitrators awarded a general balance, but did not set forth particular *items* allowed and disallowed; and the Court say, it was not necessary that the arbitrators should set forth a schedule of particulars, and state all the *items* of an account. If done, it would come to nothing with regard to any thing the Court could do. If they considered them sufficient to determine the result, all was done that was necessary. The matter rested with them, and their judgment was conclusive.

[\* 361]

Much testimony has been taken to prove that the mill was greatly overvalued. I shall not enter into the discussion of that part of the proof. Every other point has \*been considered with all possible indulgence, and even so much so,

that a good deal of testimony has been read and considered, which, upon strict rule, and even upon principles of policy and justice, ought to have been suppressed. But here I think the settled decisions of the Court interpose an insuperable obstacle to the investigation of the question respecting the measure of valuation. Admitting that there was no corruption or partiality in the arbitrators, (and none is pretended,) and admitting that there was no misconduct in them during the course of the hearing, nor of fraud in the opposite party, (and none is established by proof,) then, I say, the Court cannot inquire into the charge of an over or under valuation, or of the reasonableness or unreasonableness of the award, but it is binding and conclusive. If every award must be made conformable to what would have been the judgment of this Court in the case, it would render arbitrations useless and vexatious, and a source of great litigation; for it very rarely happens that both parties are satisfied. The decision by arbitration is the decision of a tribunal of the parties' own choice and election. It is a popular, cheap, convenient, and domestic mode of trial, which the Courts have always regarded with liberal indulgence: they have never exacted from these unlettered tribunals, this *rusticum forum*, the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted, and if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators.

To show that it is the settled law on this point, it will be useful to review the cases.

In *Greenhill v. Church*, (3 *Ch. Rep.* 49.) a bill was filed to be relieved against an award. The Court declared that they would neither confirm nor overthrow such awards, unless circumvention or corruption were proved. This was as early as 1635; and in *Cavendish's* case, which was \*before Lord Nottingham, (1 *Ch. Cas.* 279.) he declared that if parties, without the Court, refer their differences, they choose their own judges, and the Court would not relieve against the award, unless for corruption, going beyond authority, or the like.

The next case that I shall notice was that of *Brown v. Brown*, in 1683, (1 *Vern.* 157. 2 *Ch. Cas.* 140.) which underwent a full discussion. A tenant for life suffered some mills and houses, of the value of 70*l. per annum*, to go to decay, and it was computed that the reparations would cost 380*l.* The remainder-man brought an action of waste, and the parties agreeing to an arbitration, it was, by consent, made a rule of Court, but, pending the arbitration, the tenant repaired the waste, and forbid the arbitrators and umpire to

1817.

UNDERMILL  
V.  
VAN CORT-  
LANDT.

If there is no corruption or partiality in arbitrators, nor any misconduct during the hearing, nor any fraud practised by either party, the award is binding, and conclusive, and cannot be set aside by the Court, however unreasonable or unjust the award may appear.

[\*362]

1817.

UNDERMILL  
V.  
VAN CORT-  
LANDT.

proceed. The umpire, notwithstanding, awarded that the tenant should pay 380*l*. The bill was brought to be relieved against this award, for the excessiveness of the damages and for misbehavior of the umpire. The damages were charged to be outrageous, as the repairs made good the decay to within 40*s*. before the award, and the umpire had viewed them. Serjeant *Maynard* opposed the bill, on the ground that fraud or collusion was necessary to avoid an award in equity; and that if awards could be set aside on slight pretences, they might as well strike that title out of the books. The lord keeper, *North*, was of that opinion, and dismissed the bill, though he admitted that the 380*l*. was near the value, in that case, of the estate for life. He said that chancery, in some cases, relieves against manifest error in the body of the award; but where the error does not appear without unravelling it, he thought it was not relievable.

[\* 363]

In the case of *Earl v. Stocker*, a very few years after, (2 *Vern.* 251. *Hil.* 1691.) the Court set aside an award on one of the excepted grounds, of interest and corruption in the arbitrators; and cases within the reach of the exception were referred to, as that of *Pitt v. Dawbra*, where \*the arbitrators had promised to hear witnesses, and had made their award without having heard them; and the *Butcher of Croydon's case*, in which the arbitrator was not indifferent between the parties. In all these cases, the award was set aside on the ground of misconduct, partiality, or corruption, and not on the ground of error or mistake; and in *Croydon's case*, the lord keeper declared, that he did not proceed, barely because the damages were excessive, though the award, as it is stated in 1 *Vern.* 157., was for 300*l*., which was an enormous sum for that day, and was merely to repair, as the award expressed it, the honor of a man who was called a bankrupt knave.

It would be difficult to find cases stronger than these early ones, in favor of the binding nature of awards, when honestly and fairly obtained.

In *Walter v. King*, (9 *Mod.* 63.) the bill was to set aside an award for a palpable excess of damages; for the plaintiffs had goods of the defendant to 7*l.* 10*s*. only, and yet he was awarded to pay 36*l*. Lord *Macclesfield*, who was then chancellor, said, he would not set aside the award upon account of any hardship therein, because the arbitrators were judges of the parties' own choosing. A variety of cases, to the same effect, were decided during the time of Lord *Hardwicke*. He declared, repeatedly, that a bill to set aside an award must be founded upon the fraud, corruption, or misbehavior of the arbitrators; that they were judges of the parties' own choosing, and, therefore, they

could not object against the award as an unreasonable judgment; and that whether it was rightfully or wrongfully determined, the parties were bound by it, and there would be no end of controversies if it were otherwise. This was his language in the cases of *Ives v. Metcalf*, (1 *Atk.* 63.) *Lingwood v. Eade*, (2 *Atk.* 504.) *Ridout v. Pain*, (3 *Atk.* 494. 1 *Vesey*, 11.) *Tittensen v. Peal*, (3 *Atk.* 529.) and in other cases to which I might refer. \*The exceptions, or qualifications to this rule, are mentioned also in these decisions of Lord *Hardwicke*; as, for instance, where the arbitrators made their award clandestinely, without hearing each party, or where one of the parties had himself made use of fraud to mislead the arbitrators. Indeed, the cases uniformly and necessarily allow of relief, where misconduct in the arbitrator, or fraud in the party, are made to appear. (*Spettigue v. Carpenter*, 3 *P. Wms.* 361. *South Sea Company v. Bamstead*, 3 *Viner*, 139. pl. 39. 2 *Eq. Cas. Abr.* 80. pl. 8. *Burton v. Knight*, 2 *Vern.* 514.)

Lord *Hardwicke* was also disposed to extend relief to cases of palpable mistake, as in the instance of a miscalculation in an account, or of a mistake in a plain point of law; and he relied on a decision of Lord *Cowper*, to which he referred. (*Ridout and Pain*, 3 *Atk.* 494. *Anon.* 3 *Atk.* 644. *Carneforth v. Geer*, 2 *Vern.* 705.) The mistake intended by these cases, is a mistake as to figures, or of one thing, or fact, for another, and does not mean or apply to error of judgment, in its fair exercise upon a subject. Thus, in the subsequent case of *Knox v. Simmonds*, (1 *Vesey, jun.* 369.) Lord *Thurlow* observed, that a party to an award cannot come to have it set aside, upon the simple ground of erroneous judgment in the arbitrator, for to his judgment they refer their disputes, and that would be a ground for setting aside every award. There must be something more, as corruption, or gross mistake, either apparent upon the face of the award, or to be made out by evidence; and in case of mistake, it must be made out to the satisfaction of the arbitrator. This was done in the case of *Champion v. Wenham*, (*Amb.* 245.) where the arbitrators confessed a mistake in two sums, which turned the balance of the account, and the award was so far corrected.

The general doctrine on this subject is laid down, in the most clear and explicit terms, by three of the judges of the Courts of law, while they held the great seal as commissioners. \*I allude to Lord Ch. J. *Eyre*, and to the judges *Ashurst* and *Wilson*, in the case of *Morgan v. Mather*, (2 *Vesey, jun.* 15.) In that case, they observed, that it would be a melancholy thing to set aside an award, on matter of fact, because the Court differed from the arbitrators in judgment.

1817.

UNDERHILL  
V.  
VAN CORT-  
LANDT.

[ \* 364 ]

[ \* 365 ]



1817.  
  
 UNDERHILL  
 V.  
 VAN CORT-  
 LANDT.

It is their province to decide facts. The Court does not take upon itself to inquire whether arbitrators have judged right or wrong upon facts. The only grounds to set aside an award are, (1.) That the arbitrators have awarded what was out of their power, as if they award contrary to law; (2.) Corruption, or that they have proceeded contrary to the principles of natural justice, though there be no corruption, as if, without reason, they will not hear a witness; (3.) That they have proceeded upon a mere mistake, which they themselves admit. This case was, afterwards, brought up for rehearing, before Lord *Loughborough*, and he observed, that "all the arguments of the counsel was upon error and mistake; and they had not stated corruption, misbehavior, or excess of power, which were the only three grounds for setting aside awards. If parties agree to refer matters to judges of their own choice, this Court cannot correct the error of their judgment upon facts. One of these three grounds must be made out."

[ \* 366 ]

The observation of Lord *Alvanley*, some years afterwards, in the case of *Emery v. Wase*, (5 *Vesey*, 846.) was equally strong and emphatical. He said, that arbitrators chosen by the parties ever had, and he hoped ever would have, both at law and in equity, an authority, so that the award should not be overhauled, unless upon fraud, imposition, or gross mistake. Indeed, the law is understood to be so well settled on this subject, that, during the time of Lord *Eldon*, the question, as to the power of relief against the mistaken judgment of arbitrators, seems to have been entirely at rest; and the cases which have occurred before \*him, have only related to the means of excluding all partiality, unfair proceeding, and undue influence, from affecting the decision of the arbitrator. (*Walker v. Frobisher*, 6 *Vesey*, 70. 9 *Vesey*, 68. S. C. *Fetherstone v. Cooper*, 9 *Vesey*, 67.)

In finishing this review of the most material chancery decisions on awards, I think we may safely conclude, that the law is as well settled on this, as on any other subject whatever. The conclusiveness of the judgment of arbitrators has received the uniform sanction of the Court for a series of ages. The rule is not now to be shaken, nor disturbed: it is founded in so much reason and public convenience, as not to be confined merely to the Court of Chancery, but to have met with the general approbation of mankind.

The Courts of law have always been averse to grant any relief in these cases, and the injured party was obliged to resort to equity. In an action at law, on an award, even the corruption or misconduct of the arbitrator is no defence; (2 *Wils.* 148. 3 *Johns. Rep.* 367. 8 *East*, 344.) and where  
 284

1817.

UNDERHILL  
V.  
VAN CORT  
LANDT.

submission to arbitration had been made a rule of the Court of K. B., and the arbitrators were charged with mismanagement in refusing to hear one party, Lord *Holt* made it a question whether the integrity of the arbitrators could be arraigned. (*Morris v. Reynolds*, 2 Lord Raym. 857.) In this he was properly overruled; but it appears to be settled, that a court of law will not, even where the submission is made a rule of Court, enter into the merits of an award, but will look only to legal objections on the face of it, or such as go to the misbehavior of the arbitrators. (*Lucas v. Wilson*, 2 Burr. 701. *Chace v. Westmore*, 13 East, 357.) The statute of 9 and 10 W. III. c. 15., and which was adopted by the legislature of this state, in 1791, allowing a submission to arbitration to be made a rule of Court, and to be enforced by attachment, provided for relief in the special case in which the \*award shall have been procured by corruption or undue means. This statute contains the legislative sense of the final and conclusive nature of awards, except in the specified case. But though the relief is as much limited at law, and under the statute, as it has been in this Court, yet it was not, as has been suggested, from any disposition to discourage this cheap and speedy mode of settling disputes. In *Hawkins v. Colclough*, (10 Burr. 274.) Lord *Mansfield* declared, that awards were considered with greater latitude, and less strictness, than formerly, and it was right they should be liberally construed, because they were made by judges of the parties' own choosing.

[ \* 367 ]

The *English* law on the subject of awards has, as I apprehend, been adopted very universally in this country. In *Parker v. Avery*, (*Kirby's Rep.* 353.) decided in *Connecticut*, soon after the revolution, it was declared by the Court to be unprecedented there to go into the merits of an award, and that the reasonableness or unreasonableness of it did not affect its validity, so that there be no misbehavior or corruption in the arbitrators. The same rule prevails in *South-Carolina*, as appears from the case of *Mulder v. Cravat*, (2 Bay, 370.) The judges all agreed that too easy an ear ought not to be lent to complaints against awards made by judges of the parties' own choosing, and who possess all the powers of Courts of law and equity in the given case. They said, that the great principle laid down by Lord *Hardwicke*, was the best general rule which could be adopted, which was, that the only ground to impeach an award was corruption, or great misbehavior in the arbitrators, and to which, they thought, might be added, gross mistake or palpable error, though the explanation on that point was not fully given. The same rule has been repeatedly declared in the Courts in *Virginia*. The reasons for setting aside an

1817.

UNDERHILL  
v.  
VAN CORT-  
LANDT.

[ \* 368 ]

award, according to the cases there, must appear on the face of it, or there must be misbehavior in the arbitrators, or some palpable mistake. (1 *Washington's Rep.* 14. 158. 1 *H. & Munf.* 67. 2 *H. & Munf.* 408.) In one of the late cases, (2 *Munf.* 8.) it was laid down by Judge Brooke, that "whether the value of the land was ascertained upon correct data cannot now be questioned, unless misbehavior in the arbitrators, or some one of them, were proved, or a palpable mistake in the amount, and not in the manner of making up the award, was shown." The case of *Davy v. Farr*, (7 *Cranch*, 171.) in the Supreme Court of the United States, is a strong case to show the caution with which charges of improper conduct in arbitrators ought to be received.

Nor is this general doctrine, on the subject of awards, peculiar to the *English* law, or to the Courts in this country, which have followed its jurisprudence. We find in the civil law the conclusiveness of awards asserted as strongly as in any of the *English* decisions. *Stari autem debet sententiæ arbitri quam de re dixerit, sive æqua, sive iniqua sit, et sibi imputet, qui compromisit.* (*Dig.* 4. 8. 27. 2.) The prætor would not interfere with the decisions of these domestic tribunals, for the very reasons which have been adopted in modern times, because they put an end to suits, and were of the parties' own choice. *Tametisi neminem prætor cogat arbitrium recipere attamen, ubi semel quis in se recipit arbitrium, ad curam et sollicitudinem suam hanc rem pertinere prætor putat: non tantum, quod studeret lites finire, verum quoniam non deberent decipi, qui eum, quasi bonum virum disceptatorem inter se elegerunt.* (*Dig.* 4. 8. 3. 1.) But the civil law afforded a remedy against the award, if it was procured by fraud and corruption, *posse cum uti doli mali exceptione.* (*Dig.* 4. 8. 32. 14.) The observation of one of the civilians, under this title, lays down, with precision, the rule and the exception, the conclusiveness of the award. with the exception of fraud in the arbitrator or the party. *Partes aut stare debent sententia, sive æqua, sive iniqua sit, nisi \*dolus partium aut arbitratorum arguator.* (*Hub.* lib. 4. tit. 8. § 7.) I will dwell no longer on this subject, than merely to refer to a case stated in the *Institutes*, which is very much in point. If it is agreed that a thing be sold at a price to be fixed by a third person, *quanti ille æstimaverit*, the agreement is valid, and the price fixed by the arbitrator must be paid. (*Inst.* 3. 24. 1.) But *Vinnius*, in his commentary on this passage, qualifies the award with this exception: *Ergo etiamsi Titius arbitrator multo pluris aut minoris rem æstimaverit, quam valet, dicendum est valere contractum. Sane si arbitrium Titii tam prævum est, ut manifesta ejus iniquitas appareat, consentiens fere omnium opinio est, arbitrio boni riri*

[ \* 369 ]

*iniquitatem corrigi posse.* The case here stated is the very one we are considering. The parties choose arbitrators to fix the price of the mill, and they must abide by the price declared, be it too high or too low, unless fraud can be shown. This award would be declared binding by *Vinnius*, sitting under the civil law; it must be equally so under the law of this country.

Before I conclude, I ought to take notice of an objection that was raised to the jurisdiction of the Court. It is said that the *Underhills* ought to have pursued at law their remedy upon the award, as it was simply for the payment of money, and no account is sought or called for. To this it is answered, that the omission of the complainants in the original suit to sign the lease was a mistake that rendered it necessary to seek their relief here, and that their right arises partly as assignees of a *chose in action*, on which they could not have had a suit at law in their own names. The reasons are, probably, of themselves, sufficient; but, at any rate, by answering in chief, instead of demurring, the defendants submitted the cause to the cognizance of this Court, and they come too late, at the hearing on the merits, to raise the objection. It would be an abuse of justice, if the defendants were to be permitted to protract a litigation \*to this extent, and with the expense that has attended this suit, and then, at the final hearing, interpose with this preliminary objection. Such appeared to be the opinion of the majority of the Court of Errors, in the case of *Ludlows v. Simond*, (2 *Caines's Cas. in Error*, 40. 56.)

I shall, accordingly, decree, that the plaintiffs in the original suit recover the sum awarded; that there be a reference to a master to take an account of the value of the timber as it was when standing, which was cut on the premises, and appropriated towards building the mill, and its appurtenances, according to the provision in the lease, and also to take an account of the assets, real and personal, of the estate of *Pierre Van Cortlandt*, deceased, and which came to the hands of the defendants, as his representatives; and that all further questions be reserved until the coming in of the report.

Before I close, I must briefly observe upon a recent occurrence in this case. As my opinion was about to be delivered, on the 20th instant, the counsel for the defendants, in the original suit, presented a petition, in which they offered, in lieu of the sum awarded, to release, in fee, to the plaintiffs, the premises, together with such a quantity of adjacent land as the Court should deem reasonable and requisite to the full enjoyment of the mills, &c. This proposition was altogether distinct from the controversy before

1817.

UNDERHILL  
v.  
VAN CORT-  
LANDT.

Where a defendant puts in his answer, instead of a demurrer, and the cause comes on to be heard on the merits, it is too late to object [ \* 370 ] to the jurisdiction of the Court, on the ground that the plaintiff might have pursued his remedy at law.

1817.  
 ~~~~~  
 ATT. GEN'RAL
 V.
 UTICA INS. CO.

[* 371]

me, and was not contained in the pleadings, or proofs, or suggested upon the argument, and I did not feel myself authorized to act upon it any further than to suspend the decree, until the counsel for the plaintiffs had communicated the proposition to their clients, and obtained their answer. That answer, I understand, is now received, and the offer is declined, for reasons which are mentioned, but with which have nothing to do. Whatever my opinion, or wishes, may be, I consider that terms of accommodation rest exclusively with the parties. If the proposition had been made in the first instance, at the publication of the award, *and had been inserted in the pleadings, it would have been regularly before me as part of the case; but it comes too late at the very close of the controversy. I must decide the cause upon the pleadings and proofs.

Decree accordingly.

THE ATTORNEY-GENERAL *against* THE UTICA INSURANCE COMPANY.

This Court has no jurisdiction over offences against a public statute, or to restrain persons from carrying on the business of *banking*, in violation of the act passed the 6th of April, 1813, to restrain unincorporated banking associations; and a motion made by the *attorney-general*, on an information filed by him, *ex officio*, for an injunction for that purpose, was refused.

January 27th
 and 29th.

THIS was an information filed by the attorney-general, *ex officio*. It stated that by an act of the legislature, passed the 6th of April, 1813, entitled, "*an act to prevent the passing, and receiving of bank notes less than the nominal value of one dollar, and to restrain unincorporated banking associations,*" it was, among other things, enacted, that no person, unauthorized by law, should subscribe to, or become a member of, any association, institution, or company, or proprietor of any bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may do or transact, by virtue of their respective acts of incorporation; and that if any person, unauthorized by law, as aforesaid, should thereafter subscribe, or become a member, or proprietor, as aforesaid, he should forfeit and pay for every such offence, the sum of 1,000 dollars, to be recovered by any person who

288

should sue for the same, in any action of *debt, one half thereof to his own use, and the other half to the use of the people; and that all notes and securities for the payment of money, or the delivery of property, made or given to any such association, institution, or company, not authorized as aforesaid, should be null and void:† that the said act is now in full force: that on the 29th of *February*, 1816, *Bryan Johnson* and others, his associates, of the village of *Utica*, produced to the legislature, evidence of having published in a newspaper in the said village, and in the state paper, for ~~xx~~ weeks, a notice of an intended application to the legislature, to incorporate an *insurance company* in the village of *Utica*, with a capital not to exceed 500,000 dollars; and that on the same day, they presented to the legislature a petition, stating, that an association had been formed to establish an *insurance company* in the village of *Utica*, for mutual safety, and that of the community, against fire, and the hazard of navigation, on the lakes and inland waters: that an act passed the 29th of *March*, 1816, entitled “an act to incorporate the *Utica Insurance Company*,” by which, &c. That the object of the act was, as stated in the preamble to it, &c., and that the legislature did not intend to establish a banking institution, or to authorize the said *Utica Insurance Company* to engage in banking operations of any kind: that in the petition they did not request of the legislature that they might be invested with the powers of banking, nor was there any intimation contained therein, of their desire or intention to engage in such operation; and that by the act last aforesaid, the legislature intended only to grant the privileges, &c. requested in the petition, and to restrain and prohibit the association from engaging in any other operation, and particularly from those usually performed by incorporated banks. That under the act aforesaid, the *Utica Insurance Company* has been organized, by the subscription of stock, and the election of directors, and that the directors have appointed *James L. Kipp* to be president, and *Alexander B. *Johnson*, to be secretary of the said corporation. That the attorney-general hoped the *Utica Insurance Company* would have confined their operation to contracts of insurance against losses by fire, or otherwise, and to the business generally performed by insurance companies, and that they would not, in any way, have attempted to exceed the powers granted to them, and particularly, that they would not have engaged in issuing notes, receiving deposits, making discounts, or transacting any other business, which incorporated banks may of right do, &c. But now so it is, that the said *Utica Insurance Company*, combining, &c., have commenced the issuing of bank

1817.

ATT. GEN’RAL
UTICA INS. CO.

† 2 N. R. L.
P. 234.

[* 373]

1817.

ATT. GEN'RAL
v.
UTICA INS. CO.

notes to a large amount, the receiving of deposits, and the making of discounts, and, in general, all the other moneyed concerns usually performed by incorporated banks, claiming to have right to do so, by the provisions of the act of incorporation aforesaid; *whereas*, the attorney-general avers, that all such transactions are unauthorized by the said act, and are a direct violation of the act first above mentioned. That the said company have issued, and are issuing, large quantities of notes for the payment of money, which are industriously circulated, &c. *In consideration thereof*, and to the end, that the said company may make answer, under their common seal, and that they may be enjoined from issuing notes for the payment of money, from receiving deposits, from making discounts, and from all other transactions incident to incorporated banks, and that other relief may be afforded to the people, &c. Prayer for a subpoena, and for an injunction, as aforesaid, to continue until the further order of the Court.

January 27th.

The attorney-general now moved for an injunction, agreeable to the prayer of the information.

Harison, and T. A. Emmet, contra.

[* 374]

*The attorney-general cited the following authorities :

1. As to the origin and authority of the Court: *Doct. & Stud.* ch. 8. p. 19. 1 *Fonbl. Eq.* 1. note f. p. 10.

2. As to the jurisdiction of the Court, where the remedy sought is for the prevention only, and not for the punishment of an offence. (1.) In a case of forgery, *Füster v. Lord M.* 1 *Vern.* 292. *Franklin v. Hampden*, 1 *Vern.* 66. *Brownsword v. Edwards*, 2 *Ves.* 246. (2.) As to nuisances, *Coulson v. White*, 3 *Atk.* 21. *Anon.* 3 *Atk.* 750. *S. C. Ambler*, 158. *Attorney-General v. Richards*, 2 *Anst.* 603. *Same v. Foundling Hospital*, 4 *Bro. Ch. Cas.* 165. 1 *Fowl. Exc. Pr.* 293. *Mitford's Pl.* 17. *Attorney-General v. Nichol*, 16 *Vesey, jun.* 338.

3. That in England, the Court of Chancery, from its ordinary jurisdiction, is the proper forum, to try the rights of the subject in hostility to the rights of the crown, in cases. (1.) *Of an intrusion*; the *Queen v. Earl of Northumberland*, *Plowd.* 310. *Attorney-General v. Allgood, Park.* *Rep.* 1. (2.) *Of a patent*; *Attorney-General v. Vernon*, 1 *Vern. Rep.* 370. 4 *Co. Inst.* 79. 87. (3.) *Of petition and monstrans de droit*; 4 *Co. Inst.* 79. *Skin. Rep.* 609. (4.) *Traverse of Office*; 4 *Inst.* 79. (5.) *Of franchises*; *Churchman v. Turnstie*, 1 *Hard.* 162.

That a *quo warranto* is a *civil* proceeding. 1 *Str.* 101. 8. 1817.
Mod. 201. 2 *Term Rep.* 484.

That no indictment lies in this case, 6 *Bac. Abr.* 393. 9 *ATT. GEN'RAL*
Johns. Rep. 557. *UTICA INS. CO.*

As to the construction of the act incorporating the defendants, 6 *Bac. Ab.* statute (I.) 5 *Co. Litt.* 79. *a. Plowd.* 369. 1 *Atk.* 174. 2 *Term Rep.* 793.

As to the construction of the restraining act, 6 *Bac. Ab.* 391. 10 *Mod.* 282. *Prec. in Ch.* 215.

That corporations must act up to the object of their creation, and that this Court has the supervisory power of them, 1 *Bl. Com.* 479. 2 *Term Rep.* 204. *Cooper's Equ. Pl.* 103. note. 10 *Co.* 30. b. 1 *Sid.* 161. *Wm. Jones*, 168.

*For the defendants, the following points were stated and authorities cited; that this Court has no jurisdiction, there being adequate remedy at law, by an information in nature of a *quo warranto*; and that if it had jurisdiction, it would not execute it in the first instance, and before the legal right was settled at law. 2 *Cas. in Ch.* 165. 2 *Vesey*, 414. *Ambl.* 209. *Dick. Rep.* 599. [* 375]

That there is no right of property in question; and, being a violation of a statute, it was a *criminal* proceeding, with which this Court could not interfere. *Coop. Eq. Pl.* 141. 1 *Harris Ch. Pr.* 71. 2 *Vesey*, 398. 1 *Mad. Ch.* 104. 3 *Atk.* 750. *Ambl.* 138.

THE CHANCELLOR. An information is filed by the attorney-general, *ex officio*, against the defendants, charging them with engaging in banking operations, without any authority under the act incorporating them, and in violation of the prohibition in the act to *restrain unincorporated banking associations*. The information concludes not only with the usual prayer for process of *subpœna*, but for an injunction to restrain the company from the business incident to incorporated banks. *January 29th.*

I thought it not proper to listen to the prayer in this case *ex parte*, but as Lord *Eldon* did, in the case of the *Attorney-General v. Cleaver*, (18 *Ves.* 217.) I directed notice of the motion to be given.

A motion is now made, in pursuance of notice, for an injunction, according to the prayer of the information. This motion is resisted on the part of the defendants on these two grounds:—

1. That this is not a case properly within the jurisdiction of this Court, and especially not proper for the application, in the first instance, of the writ of injunction.

1817.

ATT. GEN'RAL
V.
UTICA INS. CO.
[* 376]

2. That the charge in the information, that the defendants have no authority to exercise banking powers, or that *they come within the prohibition of the restraining act, is not well founded.

I shall confine myself to the consideration of the first point, because, in the view in which I have considered it, I shall be obliged, on that objection, to dispose of the case.

The application for the injunction is not because it is intended to be merely auxiliary to a proceeding at law. The entire and final remedy is sought in this Court.

Whether the defendants have banking powers given them by the act by which they are incorporated, is, strictly, a legal question. It is equally a question of law, whether they were within the purview of the restraining act. I have always understood it to be a general principle, in respect to the powers of this Court, that when a cause depends, simply and entirely, on the solution of a dry legal question, the proper *forum* for the determination of that question is a Court of law. It appears not to admit of doubt, nor do I understand it to be disputed, that if the defendants, as a corporation, have assumed powers not within their charter, the people of this state, by their attorney-general, have a complete and adequate remedy at law, either by the common law writ of *quo warranto*, or by an *information*, in the nature of such writ. The act of the 6th of February, 1788, entitled, "an act for rendering the proceedings upon writs of *mandamus*, and informations in the nature of *quo warranto*, more speedy and effectual," declares, that if any persons shall usurp, or unlawfully hold and execute, any office or franchise within this state, it shall be lawful for the attorney-general, with the leave of the Supreme Court, to exhibit an information in the nature of a *quo warranto*, at the relation of any person, to be prosecuted in the Supreme Court, to try the right to such office or franchise, and the defendants may come in and plead. If found guilty of a usurpation, or unlawfully holding and executing any such office or franchise, the Supreme Court may give judgment of ouster, *and fine such persons for usurping or unlawfully holding and executing any such office or franchise.

[* 377]

Prosecutions at common law, or under the statute of 9 Ann., (of which this act is a copy,) have been very frequent in the K. B. against persons for assuming powers not within their charters of incorporation. Mr. Kyd, in his *Treatise on Corporations*, (vol. 2. 395—446.) has recollected numerous precedents of prosecutions, in this way, in the K. B., and it appears to be the established course.

The right of banking was, formerly, a common law right, belonging to individuals, and to be exercised at their pleasure.

The right of
banking was
formerly a com-

But the legislature thought proper, by the restraining act of 1804, and which has been since re-enacted, to take away that right from all persons not specially authorized by law. Banking has now become a franchise derived from the grant of the legislature, and subsisting only in those who can produce the grant; if exercised by other persons, it is the usurpation of a privilege, for which a competent remedy can be had by the public prosecutor in the Supreme Court. I cannot find that this Court has any ordinary concurrent jurisdiction in the case.

The *quo warranto* at common law was a criminal proceeding; and in addition to the judgment of seizure, or of ouster, there was judgment that the defendants be taken to make fine to the king for the usurpation. The information in the nature of a *quo warranto*, under the statute, is, also, strictly a criminal proceeding, being for the usurpation of a state prerogative; and the statute authorizes a fine to be imposed, as well as to oust the party from his assumed franchise. It was held to be so far a criminal proceeding in the cases of *Rex v. Bennett*, (1 Str. 101.) and of *The King v. Jones*, (8 Mod. 201.) that the K. B. did not deem itself authorized even to award a new trial. But the fine not being of late years exacted, or being nominal only, it is now so far considered as a mere civil proceeding, that a new trial can be granted. (*King v. Francis* *2 Term Rep. 484.) But it will readily be perceived, that this power is not, of itself, a decisive test whether a proceeding be properly of a civil or criminal nature; for the power of awarding new trials is now exercised at law, in all cases of misdemeanors. (6 Term Rep. 638.)

The restraining act itself considers the business of banking, without legislative authority, as an *offence*, for which the party offending is subject to a penalty. It is, no doubt, a contempt of the statute; and if a particular penalty had not been imposed, or if that penalty had not been in the same prohibitory clause, but had been in a separate, substantive section, then it seems to be admitted, (*Rex v. Wright*, 1 Burr. 543. *Rex v. Robinson*, 2 Burr. 799. *King v. Harris*, 4 Term Rep. 202.) that the party might have been punished by indictment, as for a misdemeanor.

The charge contained in the information savors, then, so much of a criminal offence, that it would require a clear and settled practice, to justify the interference of this Court, when that interference is not called for, in aid of a prosecution at law. The charge of an usurpation of a franchise, has so frequently occurred, and the remedy, by injunction, is so convenient and summary, that the jurisdiction of this Court would have been placed beyond all possibility of doubt, and

1817.

ATT. GEN'L
V.
UTICA INS. CO.

mon law right, belonging to individuals; but since the restraining act of the legislature, it is a franchise derived from the legislature.

A *quo warranto* at common law was a criminal proceeding,

So, also, is an information in the nature of a *quo warranto*, under the statute.

[* 378]

1817.
ATT. GEN'L
V.
UTICA INS. CO.

have been distinctly announced, by a series of precedents, if any such general jurisdiction existed. But I have searched, in vain, for this authentic evidence of such a power. The precedents are all in the Court of K. B., and *Kyd* cites nearly an hundred instances, within the last century, of informations filed in the K. B., to call in question the exercise of a franchise.

This Court has no jurisdiction of an offence against a public statute, or of criminal matters.

[*379]

In what cases an injunction may properly issue.

If a charge be of a criminal nature, or an offence against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this Court, which was intended to deal only in matters of civil right, resting in equity, or where the remedy at law was not sufficiently adequate. Nor ought the process of *injunction to be applied, but with the utmost caution. It is the strong arm of the Court; and to render its operation benign and useful, it must be exercised with great discretion, and when necessity requires it. Assuming the charges in the information to be true, it does not appear to me that the banking power, in this case, produces such imminent and great mischief to the community, as to call for this summary remedy. The *English* Court of Chancery rarely uses this process, except where the right is first established at law, or the exigency of the case renders it indispensable. Thus, in *Brown's* case, in 2 *Vesey*, 414. a motion was made for an injunction to stay the use of a market, and Lord *Hardwicke* said, it was a most extraordinary attempt, and that the plaintiff had several remedies which he might use. He said it would cause great confusion, to bring into contempt, upon the injunction, all persons who might use the market; and that if the Court ought to interpose at all, it would be after the title was established at law. So he observed in another case, (*Amb.* 209. *Anon.*) that the Court granted an injunction to stay the working of a colliery with great reluctance, and will not do it, except where there is a breach of an express covenant, or an uncontroverted mischief. In a late case, before Lord *Eldon* (*Attorney-General v. Nichol*, 16 *Vesey*, 338.) on an information filed to restrain the defendant from obstructing the ancient lights of a hospital, he stated that the foundation of this jurisdiction, by injunction, was that head of mischief, or those mischievous consequences, which required a power to prevent as well as to remedy, and that there might be nuisances which would support an action, but which would not support an injunction.

Carrying on banking operations contrary to the statute,

[*380]
is not such a

If the defendants are carrying on banking operations, contrary to law, they ought, undoubtedly, to be restrained; but I cannot be of opinion that the operation is such a *mischief or public nuisance, as to require the immediate and extraordinary process of this Court to abate it. I know
294

that the Court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a Court of equity to interfere at all, and much less preliminarily, by injunction, to put down a *public* nuisance which did not violate the rights of property, but only contravened the general policy.

There are no particular individuals affected or disturbed in the enjoyment of their private rights, by the banking power assumed in this case. There is no such allegation made. The case, then, has no analogy to that of *Baines v. Baker*, (*Amb.* 158. 3 *Atk.* 750.) on which some reliance has been placed, because Lord *Hardwicke* intimated, that the attorney-general, in the case of a public nuisance, could, in his discretion, file an information. In that case, a bill was filed by one individual against another, and a motion was made for an injunction to stay the building of a house to inoculate for the small-pox. The motion was founded as well on a special covenant in the lease, as on the annoyance of such an establishment to the neighborhood, and to the plaintiff's property. The chancellor said, that if that house was a nuisance at all, it was a public nuisance, because it diffused terror, and thereby affected many people; and then he said, if it was a public nuisance, it would be for the consideration of the attorney general, whether he would file an information. And where was it to be filed? Lord *Hardwicke* did not expressly say in what Court, though he referred to a case before Lord Ch. *King*, who had recommended an information for a public nuisance, in stopping a way, to be filed in the K. B. The inference then is, perhaps, as fair, that the chancellor meant that the information was to be filed in the K. B. as in this Court. Perhaps that is the stronger inference; *but be that as it may, can it be supposed that, on such a dubious *dictum*, uttered sixty years ago, I am to assume so great a power as a jurisdiction over public nuisances, which are, in truth, public misdemeanors? It is sufficient to state such a proposition, and there to leave it.

There is, however, one case on the equity side of the Court of Exchequer, which merits more attention. It is that of the *Attorney-General v. Richards*, (2 *Anst.* 603. 35 *Geo.* III.) in which an information was filed by the attorney-general for erecting docks and other buildings, to the injury of *Portsmouth* harbor; and the prayer was, that the defendant might be restrained from any other erections, and that those made might be abated. The defendant pleaded title. The injury charged was a public nuisance of a particular kind, termed *purpresture*, which means an encroach-

1817.

ATT. GEN'RAL.
V.
UTICA INS. CO.

mischief, or public nuisance, that this Court would grant an injunction to restrain the party, even if it had jurisdiction over public nuisances, which, it seems, it has not.

[* 381]

1817. ment upon, and an inclosure of, the property of the *crown*, in a highway, river, or harbor.

ATT. GEN'RAL
V.
UTICA INS. CO.

This case was elaborately argued. It was contended, on the part of the king, that, in the case of such a nuisance, it was proper to proceed by information, which might be done in equity, as well as at law, and the nuisance might be decreed to be abated. The counsel cited the case of the *Attorney-General v. Philpot*, in the exchequer, the 8 Car. I., which was an information for encroaching on the soil of the crown, on the river *Thames*, and obstructing navigation. The Court, in the case cited, declared, that *purprestures* on navigable rivers ought to be abated, and directed a commission to inquire whether the fact complained of was a *purpresture*, and it being returned that it was, the encroachment was abated. The cases of the *City of Bristol v. Morgan*, and of the *Town of Newcastle v. Johnson*, were also cited from Lord *Hale's* treatise *De Portibus Marvis*, (p. 81.) in which bills to abate *purprestures* on navigable waters had been sustained in the exchequer.

[* 382]

*The counsel on the part of the defendant contended, that as to the question of nuisance, it was a matter completely foreign to the jurisdiction of a Court of equity. It was a breach of the general police of the kingdom, and as such, was considered as a crime. That a Court of equity could not hold cognizance of any criminal matter. That it was never attempted to prosecute a suit in equity, to remedy any other public mischiefs, such as to prohibit rope-dancing, plays, &c., nor to abate a nuisance or *purpresture* on the highway. That those things were every day prosecuted in the ordinary criminal Courts. That questions of nuisance were particularly improper to be discussed in equity, because the remedy at law was complete. That the cases cited, in the time of *Charles I.*, were when the right to trial by jury was not so firmly established as it was afterwards.

The Court of Exchequer held, that the crown, by its subjects, had possession of the place in question, and that the defendant had not showed title to the soil, and that under the authorities of the cases cited, in the time of *Charles I.*, and the sanction given to them by Lord *Hale*, (see his treatise, *sup.* p. 87, 88.) in the case where a *purpresture* and nuisance had been committed on the king's soil, he might have a decree in that Court to abate it; and such a decree was accordingly awarded.

There are several observations that naturally arise upon this case. It was to redress a particular species of nuisance, consisting in an encroachment on the king's soil; and the cases cited were all of the same nature, and all in the Court

of Exchequer, which had, originally, an appropriate jurisdiction, touching the property of the crown. It shows, that the equity jurisdiction, in cases of public nuisance, even of that description, and in that Court, had lain dormant for a century and a half, or from the time of *Charles I.*, when the precedents which governed the Court arose, down to the year 1795. The nuisance, as charged *in that case, was not only a serious and dangerous one, for it affected such an important harbor as *Portsmouth*, but the crown established a right of property in the soil, and it was a question of injury to property, like the case of a private nuisance. Speaking of this case, Baron Wood says, (1 *Wightwick*, 212.) that "save in this case of nuisance and purpresture, and in the case of prerogative mills, I hold that the king's attorney-general has no right to file his bill on the equity side of the exchequer, but for matters of equity.

But giving to this case the utmost weight, there is very little analogy between it and the one now before me. Here is no encroachment on the property of the state, nor is the mischief of a similar nature. The objection to the exercise of the banking power in this case is, that it is unlawful, and not warranted by law. It would be quite extravagant to hold it to be a public nuisance, or that kind of annoyance and mischief which a nuisance implies. The information is founded on the charge, that the banking power exercised by the defendants is not given by their charter, and that it is an offence against the statute. There is no case in which an information has been sustained in this Court, on such grounds. In the case of *The Attorney-General v. Cleaver*, (18 *Vesey*, 211.) an information was filed in chancery to restrain a public nuisance, and the case of *Baines v. Baker*, and the case in the exchequer, were cited in support of the jurisdiction of the Court. But the lord chancellor doubted as to the jurisdiction, and did not recollect any case, in his experience, except that of *The Mayor and Corporation of London v. Bolt*, (5 *Vesey*, 129.) which was a private suit by bill; and he thought that the interposition of this Court was, at least, very confined and rare, and that the fact of the nuisance ought first to be ascertained by a jury.

*There is a class of cases which I may notice, in which the *English* Court of Chancery has exercised a control over corporations, in respect to breaches of trust; and even here the application of the jurisdiction has been confined to charitable institutions. In *The Attorney-General v. The Foundling Hospital*, (4 Bro. 165. 2 *Vesey*, jun. 42.) Lord Com. Eyre said, he had no doubt the Court had a jurisdiction over charitable corporations, and that when the trustees of them abused their trust, the Court would take notice of such abuse.

1817.

ATT. GEN'RAL
V.
UTICA INS. CO.

[* 383]

[* 384]

Whether this Court has jurisdiction or control over corporations in respect to breaches of trust, unless in the case of a charitable institution?

1817.

ATT. GEN'RAL
V.
UTICA INS. CO.

But in the case of *The King v. Watson*, (2 Term Rep. 199.) the Court of K. B. seemed to go further, and to think, that if any corporation misapplied moneys, it was an abuse of trust, which might be the ground of application to chancery. The chancery cases do not recognize any such general jurisdiction. In the *Attorney-General v. Corporation of Carmarthen*, (Cooper's Eq. Rep. 30.) it was denied, in the very case of a misapplication of funds. In *Adley v. The Whistable Company*, (17 Vesey, 315.) Lord Eldon, hesitatingly, admitted a jurisdiction in equity against a corporation, in favor of a member, as well as a stranger, by ordering an account of the profits, when he was excluded from a share in the profits of the company by an illegal by-law. There was, in that case, a necessity for the jurisdiction, for there was no mode of ascertaining what was due to the plaintiff, except an account in a Court of equity; and yet he said, it was with great reluctance that the Court would interfere, if the party had a complete remedy at law. In the case of *The Mayor and Commonalty of Colchester v. Lowten*, (1 Ves. & Beame, 226.) which was a bill to set aside a mortgage of corporate property, as unduly made by an officer of the corporation, under the corporate seal, for purposes not corporate, the lord chancellor held, that there was no instance of a trust attaching upon the ground of misapplication of funds by corporations, except in the case of corporations *holding to charitable uses. He evidently did not concur in the *dictum* (for it was nothing more) of the Court of K. B. in the *King v. Watson*, and did not think there was ever a case in which the doctrine of trust was applied, so as to give chancery jurisdiction over a case of a mere alienation of property to purposes not corporate, unless it was a case of a charitable trust.

[* 385]

But be this point (and which is still left open by these cases) determined either way, there is no charge of a breach of trust as the ground of this information. It does not appear, in the present case, that any more than the surplus funds of the company are appropriated to banking, or that the moneys so applied are not beneficially employed for the interest of the company. It is probable the members of the corporation deem it the best employment of their surplus capital. The charge of a breach of trust ought to come from, or on behalf of, the *cestui que trusts*, or stockholders of the company. If they are satisfied, no other person is entitled to complain. If they approve of the act of their trustees in instituting banking operations, there is no ground for any allegation of a breach of trust. That charge is not the foundation of the present suit. The information is not at the instance, or upon the relation of, the stockholders, and, consequently, these authorities have no application

The information, as I have already observed, is in the nature of a public prosecution, instituted in behalf of the state, for the violation of a public law, and the usurpation of a franchise. The whole corporation, trustees and *cestui que trusts*, are equally involved in the accusation.

But there is still another ground, with another class of cases, urged in support of the jurisdiction of this Court, and this is the power of visitation, and superintending the conduct of corporations, and which is said to be vested in the Court of Chancery.

*It will be necessary to examine some of the cases, in order to define the nature and extent of this power.

It was laid down by Sir *Wm. Blackstone*, in his *Commentaries*, (vol. 1. 481.) as a settled elementary proposition, that the king was, by law, the visitor of all civil corporations, and that the place where he exercised that jurisdiction was in the Court of K. B., where, and where only, all misbehaviors of civil corporations were inquired into and redressed. I do not cite this respectable opinion as equivalent to a judicial authority. It is pretty good evidence, however, of the received understanding of the law at that day, though the point has been since much discussed, whether the visitatorial power over civil corporations devolved personally on the king, or belonged to the K. B. by virtue of its general superintending authority.

In the case of *Rex v. Bishop of Chester*, (2 Str. 797.) the K. B. held, that where there was no other visitatorial power in being, it resulted to the K. B., and they issued a *mandamus* to the bishop, as warden of *Manchester college*, to admit a chaplain. This case was, afterwards, cited by Lord *Hardwicke*, in 1 *Vesey*, 471, as good law; and it was also relied on by Lord *Mansfield*, in the case of *Rex v. Gregory*, (12 Geo. III. 4 Term Rep. 240. note.) In this last case there was a rule to show cause why an information, in nature of a *quo warranto*, should not be filed against the defendant, to show by what authority he claimed to be fellow of *Trinity Hall*, in *Cambridge*. Lord *Mansfield* observed, that "as to the first objection to this mode of application, that the K. B. could not interfere, because if there be no visitor, the power of visitation escheated to the king, in chancery, as a charity, he answered, that the foundation there was not a charity, and that the power of visitation did not go to the king as visitor. That it was a corporation, and as such, the right devolved to the king to be exercised there in the K. B."

*So the law stood on this point, until the case of *The King v. Master and Fellows of St. Catharine's Hall, Cambridge*, (4 Term Rep. 233.) came before the K. B. in 1791.

1817.

ATT. GEN'L
V.
UTICA INS. CO.

[* 386]

Whether this Court has a visitatorial power, or superintending jurisdiction over corporations, civil, eleemosynary, or charitable?

[* 387]

1817. A rule was granted for the defendants to show cause why a *mandamus* should not issue to them, to declare the fellowship of the Rev. Mr. *Wood* vacant, and proceed to the election of another fellow.

ATT. GEN'L
V.
UTICA INS. CO.

Erskine and *Law* showed cause, and contended, that the right of visitation, in default of heirs of the founder, devolved on the king, who visited, by his chancellor, or by special commissioners under the great seal; which latter mode was adopted in *Eden v. Foster*, in 2 P. Wms. 315. They further contended, that where the king was founder of an eleemosynary or charitable corporation, or where a private person endows, and appoints no visitor, the king visits, by his chancellor. That the power of visitation was personal in its nature, to be exercised by the founder, or by the king, in his personal capacity. That the very foundation of the visitatorial power was a *general discretion*, which was repugnant to the constitution of the K. B., which was governed by established rules of law.

Bearcroft and *Le Blanc*, on the other side, held, that where the king was visitor, in right of a royal foundation, the power was to be exercised through the medium of his chancellor, and not by the K. B. That where there was no visitor the remedy was in the K. B., and that it arose from the general superintending authority which that Court exercised over all corporations. *That there was no instance of interference by the Court of Chancery where there was no visitor.*

The Court of K. B. decided, that in the case of a private eleemosynary corporation, where there was no special visitor, the right of visitation devolved upon the king, to be exercised by his chancellor, under the great seal, and they refused to interfere. Lord *Kenyon*, in giving the opinion of the Court, said, that corporate bodies, which *respected the public police of the country, and the administration of justice, were better regulated under the superintendence of the K. B., but that it was otherwise with eleemosynary foundations in general.

[* 388]

It is to be observed, that this was the case of an eleemosynary, or charitable corporation; and this is the amount of the authority on the point. The cases have no manner of application to the one before me; and if they had, I should think that the decision in *Strange*, and the opinion of Lord *Mansfield*, were of equal weight with the case I have last cited; and they give the right of visitation, where there is no special visitor even of charitable institutions, to the K. B. But the *Utica Insurance Company* cannot be termed a charity, in the sense of the law. It is a civil corporation, for private pecuniary purposes; though, at the same time,

deemed to be connected with the public good, like other insurance companies, or, like, banking, manufacturing, and numerous other civil corporations in this state. Nor do I think that this case falls within the meaning, or object, of the power of visitation, of which the books treat so largely. That power, it seems, rests entirely on general discretion; and so it was expressly declared by the counsel for the defendants, in the case just cited. In respect to charitable institutions, the chancellor exercises this power of visitation, as the personal representative of the crown. It appertains to the person who holds the great seal, rather than to the Court of Chancery, as a *Court* of equity jurisdiction. (*Ex parte Dann*, 9 *Vesey*, 547.) It may be exercised by a commission issued under the great seal. If it was not a power residing in the individual who happens to hold the great seal, but was a power in the Court of Chancery, as a proper and established branch of equity power, there is no reason why this right of visitation should not be equally exercised by the Court of Exchequer. But this has never been done, and I doubt much whether the visitatorial power exists at all, and in *any case, in this Court, in the *English* sense of that power, as a right emanating from the royal prerogative, and founded on discretion. I should rather conclude, that, under the constitutional administration of justice in this state, all corporations, of whatever name or description, were amenable to the Supreme Court, and to that Court only, according to the course of the common law, for nonuser, or misuser, of their franchises. But, at the same time, I admit, that the persons who, from time to time, exercise the corporate powers, may, in their character of trustees, be accountable to this Court for a fraudulent breach of trust; and to this plain and ordinary head of equity, the jurisdiction of this Court over corporations ought to be confined. Thus, for instance, if the directors of the *Utica Insurance Company* were to appropriate the funds, or capital, of the company to their own private emolument; or if, disregarding the business of insurance, they were to divert the funds to the destruction of that object, by making roads and canals, or building theatres, or churches, I have no doubt this Court would have a right, and would be bound, to interfere and check the abuse. But when the question is, whether a corporation has forfeited its charter, or has usurped a franchise, or has broken a penal law, the case is widely different: this Court is not the proper tribunal to sustain the prosecution, or to inflict the punishment. In the case of *The Attorney-General v. The Earl of Clarendon*, (17 *Vesey*, 491.) the master of the rolls said, that chancery had no jurisdiction with regard either to the election, or the amotion, of corporators

1817.

ATT. GEN'L
UTICA INS. CO.

[* 389]

1817.

 ATT. GEN'RAL
 V.
 UTICA INS. CO.

of any description. Eleemosynary corporations were the subject of visitatorial jurisdiction, and it is by petition to the great seal, and not by bill or information. But he admitted that corporations, constituted trustees, had sometimes been, by decrees of the Court, divested of their trust for an abuse of it, as any other trustees would have been.

[* 390]

I have thus examined every source from which the *power, now claimed for this Court, was to be deduced; and I cannot find any sufficient warrant for this proceeding. The exercise of the banking power cannot be brought under the head of a public nuisance. It has none of the characteristic marks of a mischief which calls for such a remedy as injunction. It may be endured without excessive public annoyance, until it can be abated by the regular process of the common law. Even if it was a nuisance, I should not deem myself sufficiently authorized to abate it, on the strength of one solitary modern case in the exchequer, by no means analogous. It is well understood, that public nuisances are public offences, over which the Courts of law have had a uniform and undisputed cognizance. Nor does the case, as charged, amount to a breach of trust, of which I am to take notice. There is no complaint, on the part of the stockholders, of misconduct, nor is the information founded on any thing of that kind. If there had been a prosecution instituted for a breach of trust, it would have been by bill, and against individuals by name, calling them to account for the use and benefit of the company at large. This information proceeds against the whole corporation, in its corporate capacity, for a mere usurpation of power belonging to the government alone, or to its special grantees. Nor can the jurisdiction of this Court be deduced from the visitatorial power, which the chancellor, in *England*, exercises, as keeper of the great seal, and as the king's personal representative over charitable institutions.

The plain state of the case, then, is, that an information is here filed by the attorney-general, to redress and restrain, by injunction, the usurpation of a franchise, which, if true, amounts to a breach of law, and of public policy. I may venture to say, that such a prosecution is without precedent in this Court, but it is supported by a thousand precedents in the Courts of law. How, then, can I hesitate on the question of jurisdiction?

[* 391]

*The whole question, upon the merits, is one of law, and not of equity. The charge is too much of the nature of a misdemeanor to belong to this Court. The process of injunction is too peremptory and powerful in its effects to be used in such a case as this, without the clearest sanction. I shall better consult the stability and utility of the powers

302

of this Court, by not stretching them beyond the limits prescribed by the precedents.

Without, therefore, giving any opinion on the question, whether the *Utica Insurance Company* are entitled to exercise banking powers, I am of opinion, that I have no jurisdiction in the case before me, and that the motion for the injunction must be denied.

Motion denied.

1817.

TURREL
v.
TURREL.

E. TURREL against P. TURREL and JONES.

Where a bill was filed by a wife against her husband, charging him with ill usage, and neglect to provide for her maintenance, and that he was endeavoring to get possession of a legacy left her by her father, the Court, under the 10th section of the act, (sess. 36. ch. 102.) ordered the legacy to be paid into Court, and the money to be put out at interest by the register in her name, and the interest to be paid to her separate order, from time to time, &c., until the further order of the Court.

THE bill, in this case, was filed by the *wife* against her *husband*, under the 10th section of the "act concerning divorces, and for other purposes;" (session 36. ch. 102. 2 N. R. L. 197. 200.) and the acting executor of her father, complaining of ill usage by her husband, and of his neglect to provide for her; and stating that the plaintiff, under the will of her father, was entitled to a portion of his estate, which had been sold, and her share, being about \$500 dollars, was now in the hands of the defendant *Jones*, the only acting executor; and that her husband had employed an attorney to sue the executor and recover the money, with the declared intent, that she should have no benefit from it. The bill prayed, that the defendant *J.* might be compelled to pay the money she was so entitled unto, under the will of her father, into this Court, to be paid to the plaintiff, or put out at interest, or otherwise disposed of, for the benefit of the plaintiff, as the Court might direct.

The bill was taken *pro confesso* against *Jones*, and the defendant *Turrel* put in his answer. He stated, that he was 73 years of age, and very infirm; that he had been married to the plaintiff 42 years, and had 12 children now living, the youngest being 15 years of age, and all in indigent circumstances.

March 5th.

[* 392]

1817.

H. Bleecker, for the plaintiff.

TURREL
v.
TURREL.

—————, for the defendant.

THE CHANCELLOR. The statute concerning divorces authorizes the wife to file a bill against her husband, charging him "with such conduct towards her, as may render it unsafe and improper for her to cohabit with him, and be under his dominion and control, or that he has abandoned her, and refuses or neglects to provide for her, and praying for such relief as she may think herself entitled to."

[* 393]

The bill, in this case, is founded upon this part of the statute. After the answer of the husband, proof has been taken, by the testimony of six witnesses, of improper conduct of the husband, and showing acts and declarations of unkindness, ill-will, and hatred on his part, towards his wife; that he had deprived her of many of the comforts and necessities of life, and absolutely refused and neglected to provide for her. It appears, further, *that the parties are old, have been married 42 years, and have 12 children; that they, and their children, are in indigent circumstances; that the wife has a legacy of about 500 dollars, left her by her father, which is in the hands of the defendant *Jones*, as executor to her father; and the object of the bill is to have that money secured as a separate provision for the wife. It is in proof that the husband is prosecuting the executor for that money, and has repeatedly declared, that when he obtains possession of it, he will not appropriate any part towards her maintenance.

The statute declares, that if it shall appear to the Court that such a charge, as that contained in the bill, is true, it shall be lawful, whether the Court shall decree a separation from bed and board, or not, "to make such order and decree for the suitable support and maintenance of the wife and her children, or any of them, by the husband, or out of his property, as the nature of the case, and the circumstances of the parties, may render suitable and proper."

Under the circumstances of this case, I deem it just and proper that the legacy given to the wife by her father should be appropriated for her separate maintenance and support. I shall, accordingly, decree, that the defendant *Jones* pay the legacy into Court, to the register, within 30 days after service of a copy of this decree, and that the same, after the complainant's costs are deducted, be put out, by the register, at interest, on good security, or invested in public stock, in the name of the plaintiff, and that the interest be paid, from time to time, as it shall be received, to her separate order, and that

this shall continue to be done until the further order of the Court.

Decree accordingly.

1817.

SELLS
v.
ADMIN. OF
HUBBELL.



*SELLS, administrator of SELLS, against THE ADMINISTRATORS OF HUBBELL and others.

[* 394]

Where a party has been discharged under the insolvent act, and assigned his property pursuant to the act, an application cannot be sustained, in relation to his property or interest, without making his assignees parties.

JOHN BEDIENT and *Walter Hubbell* were copartners in trade. *Hubbell* died in *August*, 1803, intestate, leaving a widow and two children. *Bedient* was discharged under the insolvent act, on the 24th of *October*, 1807, and *David R. Lambert* and *Wm. M Intire* were his assignees. The partnership, in the lifetime of *Hubbell*, was indebted to *John Sells*, deceased, in two notes, on which separate judgments were obtained at law, against *Bedient*, as surviving partner, in *May*, 1807. On these judgments executions were issued, and returned *nulla bona*. In the inventory which *Bedient* exhibited, as insolvent debtor, no real property was mentioned, nor was it mentioned that he was a creditor of the firm of *Bedient & Hubbell*. *Sells* then filed his bill in chancery against all the defendants, and, after his death, the plaintiff, as his administrator, obtained satisfaction of the judgments, from the representatives of *Hubbell*, under a decree of this Court. In the suit in chancery, thus instituted by *Sells*, *Bedient* in his answer set up his discharge under the insolvent act, and his assignees pleaded no assets.

March 11th.

It being since discovered, according to a suggestion on the part of the representatives of *Hubbell*, that *Bedient* had real property in the city of *New-York*, at the time of the docketing of the two judgments, in *May*, 1807, which was not mentioned in his inventory, exhibited under the insolvent act, nor claimed by, and probably not known to, *his assignees; the representatives of *Hubbell* applied to this Court for an order, requiring *Sells*, the administrator, &c., to assign over to them the judgments, so obtained at law against *Bedient*, and so satisfied under a decree in chancery, out of the assets of *Hubbell*, the deceased partner. A copy of the

[* 395]

1817.

SELLS
V.
ADMINS. OF
HUBBELL.

petition, with notice of the application, was served upon *E. W. King*, the solicitor of *Sells*, in the above suit, and no opposition being made, an order was obtained, as by default, on the 13th of *May* last, directing such an assignment.

The assignment was not, in fact, made, and *Sells*, the administrator, in his affidavit of the 26th of *December* last, stated, that he had never assigned the judgments, nor had notice of any order to assign. It appeared, however, that *A. Burr*, as attorney for the representatives of *Hubbell*, had revived the judgments, by *scire facias*, at law, in the name of *Sells*, since the 13th of *May* last, and had obtained judgments on two notes, and issued executions against real property in the city of *New-York*, said to belong to *Bedient*, since the original judgments were obtained in *May*, 1807, and prior to his discharge under the insolvent act, in *October*, 1807.

E. W. King, as solicitor for "*Bedient*, and his assignees," now moved to vacate the order of the 13th of *May*, as irregularly obtained, on an affidavit by *Bedient*, that he had no knowledge of the order of the 13th of *May* last, or that the same was about to be applied for, until after the revival of the judgment by *scire facias*, as aforesaid, and executions taken out against certain real property of his wife, and that he was not indebted to the firm of *Bedient & Hubbell*, at the time of the death of *Hubbell*, but he believed that, upon a fair statement of accounts, there was a considerable balance due from the estate of *Hubbell* to him, or his assignees, including the amount of the said judgments. *The names of the assignees were not mentioned, and no affidavit by them was produced.

[* 396]

Burr, contra, opposed the motion: the affidavits which he read related only to the fact of the service of the notice on *King*, the solicitor for *Sells*, and as to the improbability that the firm of *Bedient & Hubbell* should have been indebted to *Bedient*.

It was not pretended that *Bedient*, or his assignees, had any notice, in fact, of the motion for the order of the 13th of *May*, unless the service on *King* was good notice to them.

In the answer of "*John Bedient*, (who was impleaded with *John Sells*), to the bill of complaint of *James Robertson*, *John Brown*, and *Nancy*, his wife, (which said *Robertson* and *Nancy* are administrators of *Walter Hubbell*, deceased,) *Horatio William Law Hubbell*, and *Ferdinand Hubbell*, infants and heirs at law of *Walter Hubbell*, deceased," (to which answer *King* is solicitor,) *Bedient*, among other things, stated as follows: "and he likewise admits, that in

his statement made to the said recorder, at the time of presenting his aforesaid petition, he made no statement of the accounts between himself, the said *John Bedient*, and the estate of the said *W. Hubbell*, deceased, because all such accounts had been previously closed and balanced."

1817.

SELLS
V.
ADMINS. OF
HUBBELL.

THE CHANCELLOR. The application to vacate the order of the 13th of *May* last, is made on behalf of *John Bedient*. But provided the executions, to be issued at law, in the name of *Sells*, are confined (as the order of the Supreme Court, of the last term, made before this present application was made, confines them) to real property, whereof *Bedient* was seised between the date of the judgments and the date of his discharge under the insolvent act, he has no concern with this question. If he owned any such property, it must have passed to his assignees, *or been by him sold in the mean time, subject to the judgments. It is, therefore, the assignees, or the purchasers, who have an interest in discharging that order, and they are not parties to this application. It is true, that the notice of the motion is stated to be by the solicitor for "*John Bedient* and his assignees;" but the assignees are not so much as named, and we have no affidavit denying that they were not apprized of the intended application for the order in *May*, or that they have any ground to object to the claim for contribution set up by the representatives of *Hubbell*. I cannot, therefore, consider that the motion ought to prevail, in respect to the assignees, for they are not properly parties to the motion; and if they were, they have shown nothing entitling them to prevail.

[* 397]

If this was a case in which *Bedient* had an interest in the question, I should think it would not be very extravagant to consider the service of the notice of the motion, in *May*, on *E. W. King*, as sufficient notice to him, because it appears that *E. W. King* was his solicitor to an answer put in by him to a bill, by these very representatives of *Hubbell*, on the subject matter of these judgments. With respect to any equitable objection to the claim for contribution, I think it is clear that *Bedient* has none, nor have those who now represent him. The debt of *Sells* was the debt of the co-partnership of *Bedient & Hubbell*. It was the common equal debt of both the partners, and the consideration for which it was created is presumed to have enured equally to the benefit of both, and the contribution ought to be equal. The estate of each partner ought to be charged with the debt in equal portions, provided their interests in the co-partnership were equal, and their accounts as between each other were equal. This is the intendment, in the first instance; and it would be a thing almost of course for equity

1817.

SELLS

V.

ADMINS. OF
HUBBELL.

[* 398]

to allow the representatives of a deceased partner who had to pay the whole debt to be substituted in the place of the creditor in order to *recover, from the surviving partner, or his estate, a moiety of what they had paid. Nothing could stay this proceeding but the allegation of the surviving partner that he was the creditor partner, and that the estate of the deceased partner owed him a balance, as much or more than it had been obliged to pay. This would render it requisite to take and state an account between the partners, before this Court could interfere, in any way, to enforce the claim for contribution.

But, in the present case, the evidence before me is against any such well-founded pretension on the part of *Bedient*. In his affidavit on this motion, taken on the 16th of *January* last, he does, indeed, say, "that he was not indebted to *Walter Hubbell* at the time of his decease, nor to the firm, and that, upon a fair statement of accounts, he believes there is a considerable balance due from the estate of *Walter Hubbell* to him, or his assignees, including the amount of the said judgments." If this was all he had ever said, I should think an account ought to be previously taken; but his language, on other occasions, equally solemn, has been different. In his affidavit, made on the 27th *December* last, in the Supreme Court, in order to set aside the proceedings at law, under the order of the 13th of *May*, he stated, "that, at the death of *Hubbell*, the copartnership property was insufficient to pay the debts of the firm, and that, on the final settlement of the concern, he was not indebted to the estate of the deceased partner.

He here admitted that there had been a final settlement of the copartnership, and he made no pretence that the deceased partner was a debtor to the firm. And in his answer in chancery, to which I have already alluded, he admits, that in his proceedings under the insolvent act, "he made no statement of the accounts between himself and the estate of *Walter Hubbell*, deceased, because all such accounts had been previously closed and balanced."

[* 399]

*I need not, however, pursue this point. I have only looked into the facts, so far as to satisfy myself, that no injustice will probably follow from denying the motion, on the strict formal ground, that *Bedient* is not entitled to make the motion, and that his assignees, who represent his interests, are not parties to the motion, and have not shown any want of notice.

But the order for the assignment must be so taken as to operate only on a moiety of the judgments; and if it was not so done, it was taken to an extent beyond what the party was entitled to, even upon his own showing. It is not
308

alleged, or proved, that on a settlement of accounts, *Bedient* was indebted to *Hubbell*; and all that the representatives of *Hubbell* could ask for, in the first instance, was contribution for a moiety of what they had paid upon the judgments.

The motion, on the part of *Bedient*, to set aside the order of the 13th of *May* last, is, consequently, denied, with costs; and it is declared that the representatives of *Hubbell* are entitled to recover from the estate of *Bedient*, under the assignment of the judgments, a moiety only of the debt which the representatives of *Hubbell* have been obliged to pay to *Sells*, under the decree of this Court. That is what the counsel for these representatives admits to be the extent of their claim, and that is the extent to which the order of the 13th of *May* is to be carried.

Order accordingly.

1817.

BRASHER
V.
CORTLANDT.

*THE EXECUTORS OF BRASHER *against* W. R. CORTLANDT, a lunatic, by W. and P. CORTLANDT, his committee.

[* 400]

The real estate of a lunatic may be sold for the payment of his debts, on a bill filed by a creditor for that purpose, without a *petition* of the committee of the lunatic, under the *act concerning idiots and lunatics, &c.* (24 sess. ch. 30.) but the sale is to be conducted, under the directions of the Court, by a master, and the committee of the lunatic, and the terms of sale, &c. must be reported to the Court for its approbation, before any conveyance is executed.

The proper remedy for the creditor of a lunatic is in this Court, which has the sole custody and disposal of his real estate, and not by an action at law.

THIS was a suit by the creditor of a lunatic, to obtain a sale of his real estate, for the payment of the debt, in case the personal estate was found insufficient, &c. [See *ante*, S. C. p. 242.] March 6th and 12th.

The bill having been taken *pro confesso*, an order of reference was made to the master, to ascertain the amount of the personal and real estate of the lunatic, and the amount of the plaintiff's demand. The master made a report, which was confirmed on the 30th of *October*; and an order of sale of so much of the real estate as would be sufficient to pay the debt, under the direction of a master, having been made, that decretal order was, on *petition* of the committee

1817.

BRASHER
v.
CORTLANDT.

of the lunatic, set aside, without costs, and liberty given to the plaintiffs to set down the cause for a hearing. (See *ante*, S. C. p. 251.) The cause, accordingly, came on to be heard on the 6th instant.

Th. Sedgwick, for the plaintiffs.

[* 401]

Henry, for the defendants. He objected, 1. That the lunatic himself was not a party to the suit. 2. That one of the *items* in the account allowed by the master, was a note *dated 1st of *May*, 1784, for 50 pounds, given by the wife of the lunatic for house rent.

3. That the statute did not authorize a sale of the lunatic's estate, except on petition of his *committee*.

4. That the plaintiff had a perfect remedy at law.

March 12th.

The cause stood over for consideration to this day.

THE CHANCELLOR. I have already, in a former stage of this cause, expressed an opinion on the first point, that the lunatic need not be a party, and that it was sufficient if his committee were before the Court in that character. Nor does it appear to me that there is any well-founded objection to the *items* composing the account allowed by the master. One principal *item* is a note, given by the wife of the lunatic, for house rent. I think it is necessarily to be inferred from the bill, as it stands confessed, that when this note was given, the husband was incompetent to transact business, or take charge of his family, and support them; and the house rent was a charge properly made and allowed. It was an indispensable family expenditure; and what gives decisive weight to the fitness of this and the other charges, is the fact, that *Th. Van Cortlandt*, one of the committee, as late as 1810, examined the account, and admitted its correctness, by promising to pay his proportion of it, as one of the children of the lunatic.

[* 402]

The only question then is, whether the lunatic's real estate can be sold for the payment of his debts, under a decree of this Court, except upon the petition of the committee, under the third section of the act concerning *idiots, lunatics, and infant trustees*. Here was no petition of the committee, but a suit regularly instituted by a creditor against them. I think it would be too narrow a construction of the act, to make the creditors' relief depend entirely upon the petition of the committee. The care and *charge of the lunatic's estate, as well as of his person, is committed to this Court. which is, also, charged with the payment of his debts out of the real estate, when the personal estate shall be insufficient.

It is made the duty of the committee to present a petition when the personal estate shall be deficient ; but there are no express words rendering it necessary that such a petition should precede every direction for the sale of the real estate. The petition is only to set forth the particulars and amount of the estate and debts : the act goes on, and says, " and if it shall appear to the chancellor, that the personal estate is insufficient for the payment of the lunatic's debts, he shall direct a sale of the whole, or a requisite part of the real estate," &c. The substance of the provision is, that the necessity of the sale, for the payment of debts, be made to *appear*, and the mode in which it shall appear cannot be essential. It is only a circumstance, and not of the essence of the provision. Suppose, to a suit instituted by the creditor, the committee should, in their answer, state an account of the debts and estate, and admit the necessity of a sale of the real estate, would not this be sufficient evidence to the Court of the insufficiency of the personal estate ? The committee, in the present case, have done what is tantamount to this, by suffering the bill to be taken *pro confesso*, in which relief is sought by the sale of the real estate ; and the master's report, which the defendants have had due opportunity to controvert, states expressly the insufficiency of the personal estate.

The fit and proper remedy for the creditor of the lunatic is in this Court, and not by an action at law. The commitment, by statute, of the care of the lunatic and his estate to this Court, and the power given to it to sell the real estate, shows that this is the proper tribunal for the creditor to resort to.

In *England*, where the chancery provision was not, until lately, so ample, as that under our act, it was deemed very *unfit that the lunatic should be subject to personal arrest, for debt in the Courts of common law. Lord *Eldon*, when chief justice of C. B. (*Steel v. Alan*, 2 Bos. & Pull. 362.) expressed himself strongly on this point, and observed, that he was " afraid that there was no provision in the laws of *England* against arresting a lunatic ; and that the Court of Chancery was in the habit of taking extraordinary pains to assist the lunatic in this respect. Now, by the statute of 43 Geo. III. the committee may order the lunatic's estate to be sold for the payment of his debts, or, under the direction of the chancellor, raise money for that purpose by the mortgage of his estate.

The 8th section of our act contains particular directions for the Court, in respect to the regulation of sales of the real estate ; and when it is declared, in the 6th section of the act, " that the real estate of any idiot or lunatic shall not be

1817.

BRASHER
V.
CORTLANDT.

[* 403]

1817.

BRASHER
v.
CORTLANDT.

aliened or disposed of otherwise than is directed by this act," I understand the act to mean, that the real estate can only be sold under the direction of this Court. The manner in which that direction shall be obtained, is left, as it was before, to the sound construction of the other parts of the act. But this last provision is important in another view. It goes absolutely to interdict the remedy at law, by prohibiting a sale of the real estate under execution. It cannot be sold otherwise than under the direction of this Court; and if the creditor cannot file a bill for the payment of his debt out of the real estate, and if it cannot be sold in any other mode of proceeding here, than that of the voluntary or compulsory application of the committee by petition, it would present the anomalous case of a creditor entitled to payment of his debt out of the lunatic's real estate, on deficiency of the personal, and yet not permitted to institute a suit, either at law or equity, for the purpose.

[* 404]

"I am, accordingly, of opinion, that the plaintiffs in this case are entitled to a decree for the sale of the real estate of the lunatic; and that a decree for that purpose ought to be entered, similar to the one entered on the 30th of *October* last, except that the part of the real estate, in possession of the defendants, be first sold, or such parts thereof as shall be sufficient, and can conveniently be sold separately, according to the provision in the former decree; and, further, that one of the masters of this Court conduct the sale, together with the said defendants, the committee; that the master see that the sale be made at the time and place appointed, if the committee shall neglect or refuse to attend and proceed in the sale; and that the master, after making a memorandum in writing of the sale, at the time, report the sale, and the terms thereof, to the Court, for its confirmation, previous to the execution of the deed.

The following decree was thereupon entered:

"That so much of the said tract of land, consisting of four hundred and eighty acres, situate in *Yorktown*, in the county of *Westchester*, belonging to the said *William R. Van Cortlandt*, the lunatic, and mentioned in the complainant's bill of complaint, as shall be sufficient to raise the sum of seven hundred and thirty-six dollars and seventy-four cents, together with interest thereon, from the thirtieth day of *October* last, and the costs of suit, and can be conveniently, and without material injury to the residue of the said lands, be sold separately: that the part of the said real estate, in possession of the above defendants, who are committee as aforesaid, be first sold, according to the above directions. That the said sale, or sales, be at public auction, under the direction

and superintendence of one of the masters of this Court, he first giving six weeks' public notice of the time and place of such sale, together with a brief description of the premises generally, in at least two of the public newspapers, one of which to be printed in the city *of *New-York*, and the other in the county of *Westchester*, if any be printed in that county, and if not, then in two newspapers printed in the city of *New-York*. That the said sales shall be conducted and made by the said master, in conjunction with the said committee of the said lunatic, provided they, or one of them, attend at the time and place of sale, and unite in conducting the same. That a memorandum, in writing, be made at the time of the sale, and the terms of it, and that the said master, together with the said committee, provided they are ready and willing to unite with him for that purpose, and if not, that he report, separately, the sale and the terms thereof to the Court, for its confirmation previous to the execution of the deed, concerning which further directions will hereafter be given."

1817.

BOTSFORD

v.

BURR.

[* 405]

BOTSFORD *against* BURR.

If *A.* purchases an estate with his money, and takes a deed in the name of *B.*, a trust results to *A.*, and such resulting trust may be proved by parol.

Parol evidence is also admissible to rebut or destroy a resulting trust.

If the person who sets up a resulting trust has, in fact, paid no part of the consideration money, he will not be allowed to show, by parol proof, that the purchase was made for his benefit.

If part only of the consideration is paid, the land will only be charged with the money advanced, *pro tanto*.

Any payment or advance of money *after* the purchase has been completed, will not raise a resulting trust.

A written agreement may be waived by parol.

THE bill, filed *March* the 9th, 1815, stated, that the plaintiff, on the first of *May*, 1813, applied to the defendant for the loan of 900 dollars, to which the defendant agreed, provided he was permitted to purchase in a farm of the plaintiff, bought by him of *S. Skidmore*, subject to a mortgage *given by *Skidmore* to *J. Bogardus*, and which was advertised for sale under that mortgage, as security for the payment of the loan. That the defendant accordingly purchased the farm. That the plaintiff had made an agreement to purchase of *Peter Elmendorf*, lot No. 3, lying oppo

March 27th.

[* 406]

1817.

ROTSFORD
V.
BURR.

site to the farm of the plaintiff, for 3,600 dollars; that the defendant consented to assume this contract, and become responsible to *Elmendorf* for the purchase money. That this lot was accordingly conveyed to the defendant, who executed a mortgage to *Elmendorf*, to secure the purchase money. That part of the purchase money, being 500 dollars, was to be paid down, to make up which sum, the plaintiff advanced to the defendant 90 dollars; that he also endorsed to the defendant a note of *Edmund Bruyn*, dated 10th of *March*, 1809, for 1,150 dollars, as security for the plaintiff's advances and responsibilities; and the amount of which note the defendant afterwards recovered. That the defendant has since sold the property for 7,000 dollars. The bill prayed for an account, and that the defendant might be decreed to pay over to him the balance, after deducting his advances, &c., and that he assign over to the plaintiff the securities taken, &c.

The defendant, in his answer, admitted that the plaintiff applied to him for a loan of about 900 dollars, to pay off the mortgage on his farm, then advertised for sale. The defendant refused to lend the money, but offered to purchase the farm, and that if the plaintiff repaid the money and interest, and the costs and charges, in one month thereafter, the defendant would reconvey to him the farm, but on no other condition whatever. That on the 20th of *May*, 1813, he purchased the property, (*the Bogardus farm*.) at auction, being the highest bidder, for 930 dollars, which he paid to the mortgagee, and received his deed. He admitted the verbal agreement between the plaintiff and *Elmendorf*: but the plaintiff being embarrassed, *Elmendorf* applied to the defendant to purchase the lot No. 3, and he *accordingly made the purchase for 3,600 dollars, with a view to secure to himself certain advantages for pine timber, and a mill-dam, &c. essential to the *Bogardus* farm, and for no other object or benefit, and without any understanding, express or implied, with the plaintiff. The deed was dated 1st of *May*, 1813, but executed the 28th of *June*; that to make up 500 dollars to be paid to *Elmendorf*, the defendant borrowed of the plaintiff 90 dollars, which was not understood to be any part of the purchase money, or to give the plaintiff any interest in the purchase, which was made solely for the defendant's benefit, and without any trust, expressed or implied, whatever. For the residue of the purchase money, he executed a mortgage to *Elmendorf*, which had been paid off. That the plaintiff was insolvent, and had committed waste on the premises; that in the fall of 1813, the plaintiff being desirous to have some part of the property, the defendant told him, if he would pay 100 dollars monthly.

[* 407]

he would convey to him some part of the *Bogardus* farm, in proportion to the money paid ; but that if the plaintiff failed, the defendant would enter on the premises. That on the 30th of *December*, 1813, the plaintiff formally assigned to the defendant the note of *E. Bruyn*, as an indemnity for the waste committed, and for boards of the defendant, sold by the plaintiff, and agreed to pay 100 dollars a month, and if he failed to do so, there was to be an end of the business. The defendant recovered the amount of the note ; but the plaintiff never paid a single sum according to the agreement. The assignment of the note expressed the consideration to be the amount of the note paid by the defendant to the plaintiff. That on the 31st of *January*, 1814, he contracted to sell the whole property, on both farms, for 7,000 dollars, but no conveyance had been executed ; and he sold it in his own right, and for his own use, without any reference to the plaintiff, or any agreement with him.

*The material parts of the evidence are stated in the judgment of the Court.

1817.

BOTSFORD
v.
BURN.

[* 408]

R. Tillotson, for the plaintiff.

Sudam, contra.

THE CHANCELLOR. The bill proceeds on the assumed fact that the defendant purchased the *Bogardus* farm, and the *Elmendorf* lot, as trustee for the plaintiff, and took the deeds in his own name, by agreement between them, for his better security and indemnity, as he was obliged to advance, or become bound for, nearly the whole of the consideration money. The defendant is, therefore, called on, as trustee, to account for the proceeds of the subsequent sale of the lands, after being credited for the advances which he has been obliged to make, together with a reasonable allowance for his services as the plaintiff's agent.

But as the defendant purchased, at public auction, what is called the *Bogardus* farm, and took the deed in his own name, and paid his own money ; and as he purchased, at private sale, the *Elmendorf* lot, and paid part of the purchase money, principally with his own funds, and gave his bond and mortgage for the residue ; and as both these purchases were made with the knowledge and assent of the plaintiff, it will be somewhat difficult to raise a trust in favor of the plaintiff without violating the statute of frauds. The statute (sess. 10. c. 44. sec. 12, 13.) declares, " That all declarations, or creations of trusts or confidences of any lands, &c., shall be manifested and proved by some *writing* signed by the party, who is, or shall be, by law, enabled to

1817.

BOYSFORD
v.
BURR.

declare such trust, or else they shall be utterly void." The statute, however, excepts the case where "any conveyance shall be made of any lands, &c., by which a trust, or confidence shall arise or *result*, by implication or construction of law."

[* 409]

A resulting trust may be proved by parol.

If A. purchases an estate with his own money, and takes the deed in the name of B., a trust results to A.

But if a party who sets up a resulting trust has paid no money, he cannot show, by parol proof, that the purchase was for his benefit.

*It is well settled, that such a resulting trust may be established by parol proof. This point was fully considered in *Boyd v. McLean*. (2 Johns. Ch. Rep. 582.) The only real doubt or controversy, in this case, is, whether the facts make out a resulting trust under the statute. If A. purchases an estate with his own money, and takes the deed in the name of B., a trust results to A., because he paid the money. The whole foundation of the trust is the payment of the money, and that must be clearly proved. (*Willis v. Willis*, 2 Atk. 71.) If, therefore, the party who sets up a resulting trust made no payment, he cannot be permitted to show, by parol proof, that the purchase was made for his benefit, or on his account. This would be to overturn the statute of frauds; and so it was ruled by Lord Keeper Henley, in the case of *Bartlett v. Pickersgill*. (4 East, 577. note. *Hughes v. More*, 7 Cranch, 176.)

The plaintiff does not pretend, in this case, to have paid any part of the consideration, for the purchase by the defendant, at auction, of the *Bogardus* farm. The defendant purchased that farm for 930 dollars, and paid the money himself, without any advance from the plaintiff. There is then no pretext for setting up a resulting trust here, and all parol proof, for that purpose, is inadmissible. The conveyance by *Bogardus*, the mortgagee, and the payment of the purchase money by the defendant, completed the contract; and no parol proof of parol declarations, inconsistent with the deed, can be received. To admit it, would be repealing the statute of frauds, and would endanger the security of real property resting on title by deed. Nor would a subsequent advance of money to the purchaser, after the purchase is thus complete and ended, alter the case. It might be evidence of a new loan, or be the ground of some new agreement, but it would not attach, by relation, a trust to the original purchase; for the trust arises out of the circumstance that the moneys of the real, and not of the nominal purchaser, formed, at the **time*, the consideration of that purchase, and became converted into the land.

[* 410]

The only money that the plaintiff alleges he advanced was 90 dollars, at the time of the purchase of the *Elmendorf* lot, and this, he says, was part of the 500 dollars paid by the defendant on receiving the conveyance. It is not pretended, that any further payment was made by the plaintiff at the time of the purchase, though it is alleged, that some

time afterwards, he assigned over to the defendant the note of *Edmund Bruyn*, in furtherance of the same object.

A doubt has been suggested in the books, whether a resulting trust can be sustained, where only a part of the consideration was paid by the party claiming to be *cestui que trust*. Lord *Hardwicke* held that it could not, according to the case of *Crop v. Norton*. (2 *Atk.* 74. 9 *Mod.* 233.) He there said, that where the purchase money was paid by one, and the conveyance taken in the name of another, there was a resulting trust for the person who paid the money, but that this was where "the whole purchase money" was paid by one person; and that he never knew it to be so, where the consideration moved from several persons. He, accordingly, held, that as only part of the consideration, in that case, moved from *N.*, there was no resulting trust in him. I doubt whether this case is to be understood to apply; and it cannot be received as correct, where only a single individual claims the benefit of the trust; for the cases recognize the trust where the money of *A.* formed only a part of the consideration of the land purchased in the name of *B.* The land, in such case, is to be charged *pro tanto*. This seems to be the language of the case of *Ryal v. Ryal*, (1 *Atk.* 59. *Amb.* 413.) and of *Bartlet v. Pickersgill*, already referred to. So, also, in *Lane v. Dighton*, (*Amb.* 409.) only part of the consideration of the purchase arose from trust moneys, and yet the decree followed the money into the land. This is the most reasonable application of the rule; and, in the late case of *Wray v. Steele*, (2 *Ves. & Beame*, 388.) the vice chancellor held, that there might be a resulting trust by a joint advance, by two or more, upon a purchase in the name of one, and that there was no reason for confining the advance to a single individual, to constitute a resulting trust. He did not believe that Lord *Hardwicke* ever used the *dictum* imputed to him in *Crop v. Norton*.

We will now examine the proof of the payments charged to have been made by the plaintiff.

The defendant, in his answer, admits the loan of the 90 dollars, to make up the first payment of the 500 dollars to *Elmendorf*. He says, it was simply a loan, and not advanced as a payment by the plaintiff of any part of the consideration.

The plaintiff's witnesses, *Hixson* and *Couch*, say, that these 80 dollars, or 90 dollars, were advanced by the plaintiff, on account of the purchase under the mortgage sale: one of them says, he was present at the sale under the mortgage, and that the defendant then told him, that the plaintiff had, on that day, advanced him the 80 dollars on account of the purchase. It will be recollected, that this sale, under the mortgage of the *Bogardus* farm, was on the 12th of May,

1817.

BOTSFORD
v.
BURR.

If *A.* pay part only of the consideration money, and the deed is in the name of *B.*, the land will be charged with the money advanced by *A.*, *pro tanto*.

[* 411]

1817.

BOTSFORD
V.
BURR.

and the purchase from *Elmendorf*, on the 28th of *June*, and that the plaintiff charges, and the defendant admits, that the advance of the 80 dollars, or 90 dollars, was at the latter purchase. None is pretended to have been made at the former purchase, and yet these witnesses fix, with so much precision, the advance at that time. This is a remarkable instance of the inaccuracy and fallacy of parol testimony, and shows the great danger there is of giving much latitude to these implied trusts, founded on naked declarations, in opposition to the solemnity and certainty of written documents.

[* 412]

Another witness (*Wm. Doll*) says, he heard the defendant acknowledge the receipt of from 80 to 100 dollars *from the plaintiff, "on account of their contracts." This is too loose and general to be of much weight. *Henry Upham* is the only witness who directly supports the allegation in the bill. He says the defendant told him, in the autumn of 1803, that "he had received 80 dollars of the plaintiff, towards purchasing the *Elmendorf* lot." Here is an inaccuracy in this witness; for both parties admit, that the sum advanced in aid of that purchase was 90 dollars: but the question still arises, Was the money advanced as a loan to the defendant, or as a payment, *pro tanto*, by the plaintiff to the vendor? The testimony which I have stated as to this point (and it is all there is) is extremely imperfect. There was, no doubt, an advance by the plaintiff of 90 dollars, at the time of the purchase of the *Elmendorf* lot, but whether it was advanced to accommodate the defendant, or as payment of so much by the plaintiff to the vendor, through the agency of the defendant, is a point not clearly ascertained. All the proof seems to consist of confessions of the defendant; yet those confessions will, most of them, apply as well to the pretence on one side as on the other. *He received 90 dollars of the plaintiff towards paying for the Elmendorf lot*; but it is still uncertain whether it was considered as an advance by the plaintiff towards the purchase, on his own, or on the defendant's account. It is dangerous to trust to such inaccurate witnesses as those who testify concerning this payment. The observation of Sir *Wm. Grant*, (10 *Vesey*, 517.) is very applicable to this case, and he was speaking on a similar point. "The witness swears to no fact or circumstance capable of being investigated or contradicted, but merely to a naked declaration of the purchaser, admitting that the purchase was made with the trust money. That is, in all cases, most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mis-

*take, or failure *of recollection, may totally alter the effect of the declaration."*

The situation of the parties, at the time, is sufficient to throw doubt on the suggestion, that the 90 dollars were advanced by the plaintiff, as part payment of a purchase actually made on his account. He was, at the time, absolutely insolvent, and could not pay a debt of 50 dollars, which he owed to another person. He had not been able, a few weeks before that purchase, to redeem a farm, with its mills, for 930 dollars, but suffered the same to be purchased by the defendant, without any payment on his part. The *Elmendorf* lot was then purchased for 3,600 dollars, and of which sum 500 dollars were to be paid immediately. The plaintiff was utterly unable to engage in this purchase. Is it then probable that, under all these circumstances, 90 dollars would be seriously considered, by either party, as paid by the plaintiff on his own account, or that the purchase was made for his benefit?

But the plaintiff, on the 30th of *December*, 1813, which was six months after the purchase of the *Elmendorf* lot, assigned to the defendant a note against *Edmund Bruyn*; and this is put forward as a payment of part of the purchase money, from which the resulting trust was to arise.

The bill charges, that the note was endorsed to the defendant, "as a security for the advances and responsibilities entered into by the defendant for the plaintiff;" and it says, afterwards, that it was "for the purpose of procuring a reconveyance or assignment of the said farm, so bid off at public auction by the defendant, and of the lot No. 3, purchased of *Elmendorf*."

It is not easy to reconcile these distinct reasons, stated in the bill, for the assignment of the note; but if we adopt either of them as the true reason, it does not appear that the note was assigned, truly and distinctly, as a part payment, by the plaintiff, of the purchase money belonging *to the vendor, upon either of the sales. The note affords no ground for a resulting trust springing out of the purchase of either farm by the defendant, because such a trust arises only from the payment, *originally*, of the purchase money, (or, at least, a part of it,) by the party setting up the trust. The assignment of this note was an after thought and transaction; and, according to the latter reason mentioned in the bill, it was made for the purpose of procuring a reconveyance, a matter entirely distinct from the trust we are considering. The answer of the defendant puts the assignment of the note on other ground. It was made "as an indemnity for the waste committed on the property by the plaintiff, and for the boards belonging to the defendant, (which had been sold by the

1817.

BOTSFORD
v.
BURR.

[* 414]

Payment of money after a purchase has been completed, will not raise a resulting trust.

1817.

ROTFORD
V.
BURR.

plaintiff,) and in order to induce the defendant to give to the plaintiff the only opportunity he required of making some payment, so as to induce the defendant voluntarily to convey to him some part of the tract purchased under the mortgage sale."

The plaintiff's witnesses who speak of this note, give a different reason for the assignment, and one not exactly consistent with the allegations of either party. *Hirson* says, it was assigned "on account of moneys advanced by the defendant for the plaintiff, on the purchase of both the farms." It does not appear how the witness came to the knowledge of this fact; and, considering his great inaccuracy on another point, as I have already shown, we cannot place much reliance upon the correctness of this assertion, unaccompanied with any reason or authority for making it. But assuming the fact as stated, (and we may do it with the more safety, since *Upham*, another witness, testifies to the same fact, as coming to him from the repeated acknowledgments of the defendant,) the assignment of the note, even for such a purpose, cannot raise a trust out of either of the conveyances to the defendant. The trust must have been coeval with the deeds, or it *cannot exist at all. After a party has made a purchase with his own moneys or credit, a subsequent tender, or even reimbursement, may be evidence of some other contract, or the ground for some other relief; but it cannot, by any retrospective effect, produce the trust of which we are speaking. There never was an instance of such a trust so created, and there never ought to be, for it would destroy all the certainty and security of conveyances of real estate. The resulting trust, not within the statute of frauds, and which may be shown without writing, is *when the purchase is made* with the proper moneys of the *cestui que trust*, and the deed not taken in his name. The trust results from the *original transaction*, at the time it takes place, and at no other time; and it is founded on the *actual payment of money*, and on no other ground. It cannot be mingled or confounded with any subsequent dealings whatever. They are to be governed by different principles, and the doctrine of a resulting trust would be mischievous and dangerous, if we once departed from the simplicity of this rule. It is a very questionable doctrine, in the view of policy, even under this limitation; and it has been admitted with great caution, as is manifest from the cases which were reviewed in *Boyd v. M'Lean*.

But there is an objection to the parol proof, in respect to the assignment of the note. It was assigned to the defendant by a very formal instrument under seal, and, as the instrument stated, "in consideration of the said sum of money

[* 415]

now due on said note, and to him in hand paid by the defendant." The parties were concluded by this deed from setting up a different consideration, except upon the allegation of fraud, mistake, or surprise. (1 Johns. Ch. Rep. 429.) On no other ground can a deed be contradicted by parol proof. We must take the consideration to be what it is stated to be in the assignment, except so far as the defendant has admitted, in his answer, a different consideration; and that admission in this case, even if we *join with it the admission of the plaintiff, is of no use as to the charge of a resulting trust.

We are, then, brought to this conclusion, that the defendant was not, in any respect, a trustee to the plaintiff in the purchase of the *Bogardus* farm; and that he was not a trustee in the purchase of the *Elmendorf* lot, unless in a very small degree, or in the ratio that 90 dollars bear to 3,600. If the payment of part of the consideration raises a trust, it certainly cannot raise it beyond the proportion of the money paid. It can only be a charge, as one of the cases expresses it, *pro tanto*; and in this case the trust, even if admitted, is to so inconsiderable an amount as not to be worth contending for. The difference between the 90 dollars, with interest, considered as a loan, and a ratable proportion of the price for which the *Elmendorf* lot was sold by the defendant, is very immaterial. But if the plaintiff is entitled to pursue that sum into the land, the smallness of the demand will not be an obstacle. The proof of the payment of the 90 dollars by the plaintiff, as a part of the purchase money, is not, however, satisfactory; and if it was, there is evidence that the plaintiff afterwards discharged the trust. It is well settled that parol evidence is admissible to rebut a resulting trust. If the plaintiff, by his bill, sets up an equity founded on parol proof, it may be rebutted, put down, or discharged, by parol proof. (*Walker v. Walker*, 2 Atk. 98. *Lake v. Lake*, Amb. 126. *Roe v. Popham*, Doug. 24.) There may be a parol waiver even of a written agreement. (*Price v. Dyer*, 17 Ves. 356.) Now, in this case, it is in proof, that after the sale of the *Elmendorf* lot by the defendant, the plaintiff disclaimed any right or title to it. He declared to *Wm. Tremper*, "that the defendant had sold the land to *Hendrickson* and others, and made something by it. That the whole was the defendant's, and he had nothing to do with it. That he had failed in every one of his contracts with the defendant; and that he had no interest in either of the said *tracts of land. That the defendant did with it as he pleased, and that he had no claim on the defendant, unless the defendant chose to give him something."

I am, accordingly, of opinion, that the plaintiff has failed

1817.

BOTSFORD
V.
BURN.

[* 416]

Parol evidence is admissible to rebut a resulting trust.

A written agreement may be waived by parol.

[* 417]

1817.

BOTSFORD
V.
BURR.

in charging the defendant as a trustee, in the purchase of either of the tracts of land mentioned in the bill. The defendant is, therefore, bound to account for the 90 dollars, with interest, and for the amount of the note assigned to him, with interest. This is what he offered to do by his answer. But he claims likewise the benefit of the consideration, for which he admits the note to have been assigned, and which was for waste committed on the lands between the time of the purchase by the defendant and the assignment of the note, and for boards of the defendant's which the plaintiff sold. It appears, also, by the testimony of two of the witnesses, (*Henson* and *Upham*,) that after the purchase of the *Elmendorf* lot by the defendant, and before the sale by him, the plaintiff had made beneficial improvements upon it; and as it appears that the plaintiff was suffered to continue in possession, under some indistinct encouragement held out by the defendant, that he might eventually become interested in the lands, it is equitable, under all the circumstances of this case, that the plaintiff should have a reasonable allowance made him, for such beneficial and permanent improvements as he may have made on the lands, between the time of the purchase and sale of the defendant, as stated in the pleadings.

I shall, accordingly, direct a reference to a master, to take and state an account between the parties, upon the following principles, viz. That he compute the amount of the loan of 90 dollars, and of the note assigned, with interest; that he ascertain, by proof, the damages, if any, arising from waste, committed by the plaintiff, or by his direction, on any part of the lands, between the time of the purchases and the sale thereof by the defendant; also the *amount of boards belonging to the defendant upon the said lands, and sold, or otherwise converted by the plaintiff; and that he further ascertain the value of the beneficial and lasting improvements, if any, made by the plaintiff on either of the tracts of land, during the period aforesaid; also, what would be a reasonable allowance to the defendant for the use and occupation of the said lands by the plaintiff, during the same period. All further questions are reserved until the coming in of the report.

Decree accordingly.

1817.

PHILLIPS
v.
THOMPSON.

PHILLIPS *against* THOMPSON.

A holder of a note is entitled to the benefit of a collateral security given by the maker to the endorser, for his indemnity.

A security taken for a specific purpose can be applied by the holder to that precise object only, and no other.

R., a maker of a promissory note, gave a judgment bond to the endorser, to indemnify him against his endorsement. The note was protested for non-payment, but due notice was not given to the endorser. He, however, afterwards assigned the judgment to the holder of the note, in consideration of being released from all responsibility on his endorsement. This assignment was held to be a waiver of want of due notice, and tantamount to a promise to pay.

A subsequent mortgagee, or judgment creditor, has no equity to allege against such a waiver of want of notice, in order to avoid the judgment so given for the indemnity of the endorser.

THE bill stated that *David Reed*, being indebted to the plaintiff, assigned to him, on the 12th of *March*, 1814, as security for the debt, a bond and mortgage of *O. W. Van Tuyl*, to *Reed*, dated the 1st of *January*, 1813, for 1,000 dollars. That when the plaintiff took the assignment, he supposed the premises free from all encumbrances. That he had since discovered that *Reed* gave a judgment bond (on which judgment was entered the 2d of *July*, 1812, in the Supreme Court,) for 4,000 dollars, to *Deforest* and *Osborn*, to indemnify them as endorsers of a note made by him for 4,000 dollars, and previously endorsed by the defendant, and delivered to *Isaac Bronson*. That the note was payable in 90 days, and was, several times, renewed with the same endorsements, until the 14th of *January*, 1814; and the last note, of that date, was protested for non-payment, but no notice was given to the endorsers, *Deforest* and *Osborn*, so as to charge them as endorsers; and the note was not afterwards renewed. That to indemnify the defendant against his endorsement on the note, and for other responsibilities, *D. Reed* and *Henry Reed* gave a judgment bond to him for 500 dollars, on which a judgment was entered up on the 9th of *March*, 1814, and on which the defendant had taken it execution, and raised 3,000 dollars out of the personal estate of *D. R.* and *H. R.*, and had also levied on their lands to a large amount. That *Deforest* and *Osborn* assigned the judgment of *D. Reed* to *Bronson*, who has assigned it to the defendant, though *Deforest* and *Osborn* knew that they were not liable as endorsers, and that the judgment was given solely for their indemnity as endorsers. That the defendant had also taken out execution on this

April 3d.

[* 419]

1817.

PHILLIPS
V.
THOMPSON.

judgment, which had been levied on the property mortgaged, and assigned to the plaintiffs, which was advertised for sale.

The bill prayed for a perpetual injunction against selling the mortgaged premises; and that the defendant cause satisfaction to be entered on the judgment, or that he release the lien, &c.

The defendant, in his answer, alleged, that *Bronson* made it a condition of his loan of the 4,000 dollars to *D. R.* that a judgment bond should be given by him to *D.* and *O.* for their indemnity, and his, *B.'s*, security; and that *D.* and *O.* were to hold the judgment, in trust, for *Bronson*. That they *acted as agents of *D. R.*, and as trustees of *B.*, in renewing the notes and endorsements, &c. That *D.* and *O.* considered themselves responsible as endorsers, and assigned the judgment to *B.*, in consideration of his releasing them from their liability as endorsers of the note.

[* 420]

Deforest, who was a witness, denied any notice of the protest of the note, and said, that being repeatedly applied to, and threatened with a suit, they, *D.* and *O.*, offered to assign the judgment to *B.*, on being released as endorsers, which was done.

Bronson, a witness, stated, that the defendant had paid to him the amount of the notes endorsed, except about 500 dollars, and had, on the 1st of *August*, 1814, given the witness a judgment bond for 4,044 dollars and 37 cents, as security, on which judgment was entered up, and held as security for the balance; and that he assigned the judgment against *D. Reed* to the defendant, on the 8th of *September*, 1814, in consideration of his having assumed and secured the note of *D. R.*, as above stated.

Riggs, for the plaintiff.

Slosson, and *Sedgwick*, for the defendant.

April 3d.

THE CHANCELLOR. There are two points to be considered in this case:—

1. Whether the judgment assigned to the defendant was, at the time, a valid and subsisting judgment, which he was entitled, in equity, to enforce. And, if so, then,

2. To what extent was he entitled to use it, and how far is it to be considered as satisfied by sales under it.

1. The judgment was given, as *Deforest* states, for the indemnity of *Deforest* and *Osborn*, as endorsers for *David Reed*, on a note for 4,000 dollars, given by him to *Isaac Bronson*. The note was repeatedly renewed with the *same endorsers, and the last note on which *D.* and *O.* were en-

[* 421]

1817.

PHILLIPS
v.
THOMPSON.

dorsers, was payable on the 8th of *January*, 1814. It was not paid, and due notice of non-payment was not given to those endorsers. This fact of the want of due notice from the holder may be taken as sufficiently established. It is then contended, that *D.* and *O.* being no longer responsible, the consideration of the judgment ceased, and it ought not to be deemed in force. But, in answer to this, it is said there are circumstances which go to show that *Deforest* and *Osborn* are not, in equity, entitled to set up the want of notice, even if they were, in strictness of law, discharged. It is to be inferred, that they knew that the note in question could not have been paid when it fell due, because they had in their possession other notes of *Reed*, which were intended by him to meet it, and which they refused to endorse, and because they had, all along, acted as the agents of *Reed* in the negotiations attending the renewal of all the preceding notes. But whether they had this knowledge or not, it was not the notice that the law required, and they were entitled to stand upon their legal rights. If, however, they were not duly fixed as endorsers, yet *D.* and *O.* might, at any time, waive the want of due notice, and take up the note. This every endorser may do, and if he promises to pay under a knowledge of the defect of notice, he is still bound. *D.* and *O.* did not pay, or promise to pay; but they did what was tantamount. With the knowledge of the protest of the note, and of the want of notice, and after they had considered themselves exonerated, on strict legal grounds, as endorsers, they assigned to *Bronson*, the holder of the protested note, the judgment given to them for their indemnity as endorsers, and they assigned it, as they state, in their assignment, "in consideration of being released from their endorsement of the said note." This was, in effect, a waiver of the *want of notice, and an admission that they were liable as endorsers. It is so reasonable, under the circumstances of this case, that the holder should not be deprived of the security resulting from their endorsement, and the judgment given to support it, that I feel inclined to consider the fact of the assignment as evidence of a promise to pay, and a promise fulfilled by means of the assignment. None of the parties to the note or the judgment can object that the judgment is made to answer for the payment of the note which *Reed* gave, and *D.* and *O.* endorsed. In the case of *Maure v. Harrison*, (1 *Eq. Cas. Abr.* 93. K. 5.) and which was cited in 1 *Johns. Ch. Cas.* 129., a bond creditor was held entitled to the benefit of any collateral security given by the principal debtor to the person who became his surety to the creditor. It is extremely just that the judgment here should be so applied: the act was not done in fraud of the plaintiff;

[* 422]

1817.

PHILLIPS
v.
THOMPSON.

and he has no equity to set up against any waiver by these endorsers of the want of notice. They had a right to pay the note and resort to the judgment for their indemnity. They had an equal right to assign the judgment to the holder, and obtain their discharge in that way, if they thought proper. They were dealing with their own rights, and the plaintiff has no ground to complain of the transaction.

I have not placed any reliance on the trust set up by the defendant, though *Bronson* may have considered the judgment taken by *D.* and *O.* as taken for his benefit, yet he admits there was no agreement between him and them on the subject, and *D.* states, expressly, that the judgment bond was taken on the account, exclusively, of *D.* and *O.* as endorsers, and for their indemnity. The bond and warrant speak that language, and no other; and I doubt very much whether parol evidence is alone sufficient to raise a trust, in opposition to the language of the instrument. (*Fordyce v. Willis*, 3 Bro. Ch. Cas. 577.) *There is, indeed, an equivocal expression in the assignment, which might afford color for the inference of such a trust, but that is not sufficient when we consider the positive testimony of *D.*, and the admission that *D.* and *O.* made no such agreement when they took the bond. They took it on their own account, without any intention or knowledge of being trustees.

[* 423]

2. The next point respects the use which the defendant is entitled to make of that judgment.

It was given for a specific purpose, and to that purpose, exclusively, it ought to be applied. It is held only to secure the payment of the note which fell due on the 8th of *January*, 1814. The defendant admits, that there have been large sales of the property of *D. Reed* under that judgment, and under a subsequent judgment of the defendant against *D.* and *H. Reed*, and which last judgment was given to cover all the extensive responsibilities of the defendant. The sales, by virtue of the executions under both judgments, were made on the 25th of *November*, 1814, and the defendant, in his further answer, admits, that the sales which took place at that time, were under both judgments, and that the money raised amounted to 2,434 dollars. The sales were under both judgments indiscriminately; but as the judgment assigned to the defendant was the elder judgment, and given for a specific object, he ought to have applied the moneys so raised to the discharge of that judgment. If he were to be permitted to sell under both judgments, without discrimination, and then to apply the proceeds to his responsibilities at large, the elder judgment might be diverted to purposes foreign from its object, and be made a mask to cover claims.

over which an intervening encumbrance has a preference. The fair and just rule, in this case, will be, to satisfy the judgments out of the proceeds of the joint sale, according to the order of priority, and then each encumbrance *will have its due force and effect. The defendant has raised, under the first judgment, 2,434 dollars, provided all the moneys, raised by the indiscriminate sales under both judgments, be applied to that judgment. Whether the moneys have been so credited or not, they ought to be, and the judgment assigned be held to answer only for the residue of the 4,000 dollars with interest, after crediting the 2,434 dollars, from the time of the sale. I do not perceive the propriety of going further, or of interfering with the moneys previously raised under the second judgment, or of requiring the note to be actually paid up by the defendant, before he collects the amount of it. The judgment was taken by *Bronson*, and assigned by him to the defendant, as a satisfaction of the note which the defendant, as prior endorser, took up, and the defendant gave a judgment bond to *Bronson* for the whole amount of it.

Whether there will be any property left to satisfy the plaintiff's mortgage after the residue of the debt due to the defendant is raised, cannot be known. The defendant, however, is entitled to go on and raise it; and I shall, accordingly, dissolve the injunction, so far as to allow the defendant to collect the balance due him, as aforesaid, unless the plaintiff shall elect to pay that balance, and take an assignment of the judgment.

Decree accordingly.

327

1817.

PHILLIPS
V.
THOMPSON.

[* 424]

1817.

BROWN
v.
RICKETTS.

*BROWN *against* RICKETTS and others.

Copies of affidavits to support a special motion or petition, must be served on the solicitor of the opposite party, with notice of the motion.

Leave to withdraw the replication, for the purpose of excepting to the answer, is not allowed, unless for special cause clearly shown, and satisfactorily accounting for the neglect of the plaintiff. Where three months had elapsed from the time of filing the answer, and no good cause shown for the delay, the application was refused.

But if the plaintiff wishes to withdraw the replication, merely for the purpose of setting the cause down for a hearing on the bill and answer, it seems the motion will be granted.

A replication cannot be withdrawn for the purpose of amending the bill, unless the plaintiff shows the materiality of the amendments, and why the matter proposed to be introduced as amendment, was not before stated in the bill.

April 9th.

BILL for a legacy, filed the 3d of *October* last. The defendants put in their answer the 13th of *December*, and the plaintiff filed his replication the 4th of *January* last. The plaintiff now presented a petition for leave to withdraw the replication, to enable him to *except* to the answer, and to *amend* his bill.

The petition was not sworn to: a copy of it, with notice of the motion, was duly served on the solicitor of the defendants.

An affidavit of the plaintiff's solicitor, made since the service of the notice of the motion, a copy of which had not been served on the defendants' solicitor, was produced, stating, that the replication was filed through misapprehension, on the ground that the answer was sufficient, arising from his perusal of an imperfect and incorrect draft of the bill; and that he had since discovered that the bill filed charged the matters which he supposed were omitted, and which were not fully answered.

The affidavit of the defendants' solicitor stated, that the answer filed was a full answer to the bill; that since the *cause was at issue, no step had been taken by the plaintiff; and that, on the 21st of *March*, he entered rules to produce witnesses, and to show cause against publication.

[* 426]

Burr, for the plaintiff, contended, that the bill on file was full; that the only amendment desired was matter of form, and did not require a further answer. That the answer put in was defective, in not showing how the amount of the legacies, acknowledged to have been received, had been disposed of, or were now invested. That this motion was a
328

matter of course, on payment of the costs of the rule to produce witnesses. He cited 1 *Harr. Ch. Pr.* 302. 3 *Atk.* 565. 579. *Pract. Reg.* 202.

1817.

BROWN
v.
RICKETTS

Riggs, contra, insisted that there ought to have been an affidavit of the truth of the matters stated in the petition; that the petition did not state any mistake or inadvertence in filing the replication, nor wherein the answer was defective; and that a replication ought not to be withdrawn for the mere purpose of excepting to an answer. He cited *Cooper's Eq. Pl.* 328. 1 *Harr. Ch. Pr.* 426. 3 *Atk.* 565. *Wyatt's Pr. Reg.* 376.

THE CHANCELLOR. The petition states two objects of the motion for leave to withdraw the replication; the one is, to except to the answer; the other, to amend the bill.

April 9th

As to the first object; the plaintiff does not state, in his petition, wherein the answer is defective, nor why the defects, if any, were not discovered before. It is now upwards of three months since the replication was filed. There is, indeed, an affidavit presented on making the motion, but that affidavit was not served on the opposite solicitor, and if notice of the motion was requisite at all, (which is not disputed,) a copy of the affidavit on which it was founded ought equally to have been served. The affidavit is, therefore, not regularly before me on this motion; *and even if it were, the reason therein assigned for the motion is not sufficient. The plaintiff's solicitor says, he filed the replication through misapprehension, inasmuch as he mistook an incorrect draft of the bill for the corrected copy on file, and that the answer, though good as to the former, is not as to the latter. But this affidavit does not disclose wherein, or to what extent, the answer is insufficient, nor when the variation between the draft of the bill, and the one on file, was discovered, nor in what that variation consists. The excuse itself is feeble and imperfect. The solicitor to the bill compares the answer with some defective draft of his own bill, and now comes, three months after the cause is put at issue, with such a plea of negligence, and with all this want of precision and regularity in bringing forward the motion, for leave to file exceptions to the answer. This would be granting an unreasonable indulgence, and one leading to vexation and delay in the prosecution of a suit. It was said, by Lord *Hardwicke*, in *Pott v. Reynolds*, (3 *Atk.* 565.) that the Court rarely grants leave to withdraw the replication, unless there be some special cause shown to induce the Court to grant this indulgence; and the books say, that as the replication admits the

[* 427]

1817.

BROWN
v.
RICKETTS.

sufficiency of the answer, it is not usual for the Court to allow the plaintiff to withdraw it, for *the purpose of excepting to the answer*. (*Wyatt's P. R.* 202. *Cooper's Eq. Pl.* 328.) The reasons for such an application should be clearly stated, and be of sufficient import, and the *laches* of the plaintiff fully accounted for. The rules of the Court allow only three weeks to except to the answer. The policy of the rule is to make the party vigilant, and oblige him to look early and well to the answer. If the object of the motion was only to set down the cause for hearing, on bill and answer, I presume that it would be much, of course, according to the late case of *Cowdell v. Tatlock*, (3 *Vesey & Beame*, 19.)

[* 428]

*The other object of the present motion is to amend the bill. The petition states, that the bill is materially defective; but the affidavit of the plaintiff's solicitor states, that the bill fully charges the matters which he, at first, thought had been omitted, and the same solicitor now states, in support of his motion, that the bill is full, and that the only amendment desired is one of mere form, and requiring no further answer. It will readily be perceived, that this is not sufficient ground for withdrawing a replication several months after it has been filed. To withdraw the replication for the purpose of amending the bill, the plaintiff must show the materiality of the amendments, and why the matter to be introduced by the amendment was not stated before, otherwise the rules of the Court to prevent vexatious delays of the plaintiff would be nugatory. (*Longman v. Calliford*, 3 *Anst.* 807.)

The motion is, accordingly, denied, with costs.

1817.

LUPTON
v.
JOHNSON.

HAMERSLY *against* BROWN.

After publication has passed, but the deposition taken not read, a motion to enlarge the time of publication will not be granted, but on special cause shown, and due notice to the opposite party of the motion.

PETITION to enlarge publication, for six weeks, to examine witnesses. The petition admitted that publication had passed, but an affidavit accompanied the petition, that the depositions taken had not been read.

April 9th.

Burr, for the motion.

THE CHANCELLOR denied the motion, for want of notice to the plaintiff's solicitor. Such a rule, after publication *has already passed, is not to be granted without due notice to the opposite party; for it is not a rule of course, and must be founded on special circumstances.

[* 429]

Motion denied.

LUPTON and PEARSALL *against* JOHNSON and others.

A rule to produce certain bonds before the examiner, for the inspection of the opposite party, will not be granted, where the existence of one of the bonds is denied, and the other is denied to have been received by the plaintiff for the purpose alleged by the defendant; but a cross bill, or bill of discovery, is the proper remedy.

MOTION, on the part of the plaintiffs to vacate an order obtained by default, requiring the plaintiffs to produce certain bonds before the examiner, in four days, for the inspection of the defendants.

April 9th.

The default being sufficiently accounted for, the original motion was opened.

J. L. Riker, for the defendants, contended for the propriety of the order, as more simple, and less expensive, than a cross bill That it is a rule of evidence, at law and in

1817.

LUTTON
v.
JOHNSON.

equity, that deeds in the hands of the opposite party may be proved by parol, unless produced on notice. He cited 13 *Vesey*, 546. *Hind. Pr.* 54. *Phillips's Ev.* 338. 1 *Vesey*, 503. *Amb.* 247. 1 *Turner's Ch.* 83.

[* 430]

Riggs, for the plaintiffs, after accounting for the default, read the affidavits of the plaintiffs, denying the existence of one of the bonds, or that the other was received in payment of any legacy. He then contended, *that if the latter bond was produced, under the order, it might be an implied admission that it was taken in discharge of the legacy. That a cross bill of discovery was the only true and proper course. Whether the bond so existing was given in discharge of the legacy was the very point in dispute, and the party cannot produce it, without admitting it to be what, he says, it was not intended to be.

THE CHANCELLOR said, the rule to produce the bonds must be vacated, under the circumstances disclosed. It was most safe, for the rights of the parties in this case, that the defendants should be put to their cross bill, or bill of discovery. Such a motion has been denied, (*Darwin v. Clarke*, 8 *Vesey*, 158.) where the opposite party had not admitted the deed to be in his possession. Here the party denies his possession of one bond, and denies that the other was ever received in the sense contended for; and the order might prejudice his right.

Rule vacated.

1817.

BEATY
v.
BEATY.

BEATY *against* BEATY.

A creditor, who has the body of his debtor in execution, cannot be a petitioning creditor under the insolvent act; nor is he entitled to apply to a judge for an assignment of the debtor's estate, under the 9th section of the act. (Sess. 36. c. 98. s. 9. 1 *N. R. L.* 460—464.)

BILL stated, that the complainant was imprisoned on a *ca. sa.*, issued in favor of the defendant, on a judgment at law; that he had an estate, real and personal, much more than sufficient to pay the judgment. That he owed no other debt than that on which he was imprisoned. That the recovery *against him was in an action of slander, and that the execution had been stayed by order of the Supreme Court as to the costs. That having been imprisoned on execution, for 60 days, and upwards, the defendant had made application to the recorder of the city of *Albany*, under the 9th section of the insolvent act, of the 12th of *April*, 1813, to compel an assignment of his estate; and the creditors were called on to show cause on the 11th inst. The bill prayed for an injunction to stay the proceedings before the recorder.

April 10th.

[* 431]

Crary, for the plaintiffs, moved for the injunction, and cited 1 *Str.* 653.

THE CHANCELLOR. It was decided by Lord Ch. *King*, in *Burnaby's* case, (*Str.* 653.) that the creditor who has the body of his debtor in execution, cannot be a petitioning creditor under the bankrupt law. This case, afterwards, received the sanction of the K. B. in *Cohen v. Cunningham*, (8 *Term Rep.* 123.) It was there decided, as founded in principle and in law, that a judgment creditor, who has taken his debtor in execution, has made his election, and is bound by it, and cannot, afterwards, sue out a commission of bankrupt against him for the same debt. This has become the settled rule in chancery. (*Ex parte Cundall*, 6 *Vesey*, 446. *Ex parte Arundel*, 18 *Vesey*, 231.) Lord *Kenyon* said, it would be an anomalous case for a creditor who has made his election to proceed against the body, to be able, by his own act, to change the nature of his execution, and pursue his debtor's property. I am satisfied with the solidity and equity of this principle, and I think it ought to be applied to this case, which is very analogous. Though the words of the act are general, and speak of *any creditor*,

1817.
 HAMERSLY
 v.
 LAMBERT.
 [* 432]

yet those words may easily be supposed to have intended any creditor *other than the one who has charged the debtor in execution*, for there is not any *provision in the 9th section that seems to apply particularly to such a creditor. I shall, therefore, under my present impression, suffer the injunction to go.

Injunction granted.

HAMERSLY *against* LAMBERT and others.

After publication has once passed, witnesses cannot be examined, unless under very special circumstances.

To enlarge publication, is to stay or postpone the rule for passing publication; and a motion for that purpose may be granted, on reasonable cause shown; but this is very different from a motion to examine witnesses, after publication has actually passed.

April 29th.

BURR, for the defendants, moved for leave (publication having passed) to examine witnesses, on an affidavit stating that the defendants had several material witnesses to examine; and, on the further usual affidavit, that the defendants, or their solicitor, had not seen or been informed of the depositions taken, and would not, &c.

G. Brinkerhoff, for the plaintiff, opposed the motion, on an affidavit that publication had actually and duly passed, on the 4th of *October* last, and that the cause was noticed for hearing on the 16th of *October* last, and would have been brought on, if the time of the Court had then permitted.

No reason was assigned on the part of the defendants for not examining the witnesses before.

[* 433] THE CHANCELLOR. To allow this motion, after publication has passed, without good cause shown, and without a sufficient excuse for the delay, would be overturning *the established course and practice of the Court, and setting a mischievous precedent. The rule not allowing evidence to be taken after publication, is founded in wisdom and sound policy. It is intended, as Lord Ch. *Manners* observed, in a late case, (*Ball & Beatty*, 284.) to guard against the mischiefs which would result from holding out an opportunity to a party to supply a defect by fabricated evidence. The 334

same principle prevails in the Courts of law, in respect to the granting of new trials. A new trial will not be granted, if the party has not used due diligence to prepare himself for the first trial, because, among other objections, it would tend to introduce fraud and perjury, by taxing the ingenuity of a party, after the disclosure of his adversary's strength, to supply all deficiencies of testimony on his side. (1 *Wils.* 98. 2 *Binney*, 582. 9 *Johns. Rep.* 78.) The party, on such motions as this, does, indeed, make the usual oath, that *he has not seen, heard, or been informed of, nor will he see, hear, or be informed of, the contents of the depositions taken*, until publication shall be again duly passed; but such an oath ought not to be much encouraged. It is partly promissory: it may be difficult to be strictly kept, and is of dangerous and suspicious tendency. It is of great importance, in the administration of justice, and ought to be constantly inculcated upon suitors, that they must bestow *diligence* in the prosecution and defence of their suits, and that every step in the progress of the cause is to be taken *orderly*, and in *due season*; and that though the Courts are indulgent to mistakes and unavoidable accidents, yet they cannot be so to the mere negligence or wilful defaults of parties, which only tend to hinder, fatigue, and oppress each other.

The practice has appeared to me to be so lax on this point, and applications for this kind of indulgence are so frequent, that I have thought it necessary to look into the practice and opinions of the *English Court of Chancery*, and to see how far the rule has been established and supported.

*There is an important difference between an application *to enlarge publication*, for the purpose of taking testimony, and an application to take testimony, as in this case, after *publication has passed*. The books frequently speak inaccurately on this point, by using terms which tend to confound all distinction. To stay or enlarge publication, is, strictly speaking, to postpone to a further time the passing publication, and it presupposes that publication has not passed. To enlarge publication, in this sense of it, is almost a matter of course, if there be any reasonable cause shown, and the other party will not suffer any harm, as where the hearing will not be put off. It is said, (*Gilbert's Forum Romanum*, 144.) That the motion, in this case, must be upon notice and reason shown, why the party could not examine his witnesses sooner, though, if it will not produce injurious delay, "The Court will enlarge publication upon asking for." But in *Harrison's Prac.* (vol. 1. 501.) the order is stated to be as "of course," without notice; and it is upon terms, so as not to hinder the other party from setting down his cause; and if publication has been already once enlarged, then the

1817.

HAMERSLY
v.
LANBERT.

[* 434]

1817.

HAMERSLY
V.
LAMBERT.

[* 435]

motion is upon notice and affidavit showing satisfactory cause. In the case of *Gearl v. Barber*, (2 Bro. Ch. Cas. 1.) the defendant was allowed a new commission to examine witnesses; but Lord *Thurlow* required it to be at his own expense, and, though publication had not passed, he still required an affidavit that the defendant, or his agents, had not, and would not willingly see or be informed of the depositions, until, &c. So, in a late case in the exchequer, (*Dingle v. Rowe*, 1 *Wightwick*, 99.) a motion to enlarge publication, and sue out a new commission, was granted on payment of costs, in case the opposite party should not examine in chief, but only cross examine, and on the commission being made returnable without delay, and when it would produce no inconvenience to the plaintiff, and on affidavit by the solicitor that the witnesses were material and that he had not, and he believed the defendants had not, been informed of the contents of the depositions. Both these motions were brought on in term time, upon regular notice. I observe also, that according to the old practice in *Bohun's Cur. Can.* (p. 328.) such an affidavit of not having seen the depositions is used as well before as after publication, when a new commission to examine witnesses is asked for.

But if publication has actually passed, when application is made for leave to examine witnesses, then it must be upon special and satisfactory reasons to be assigned, both of the previous neglect, and of the further examination, and the Court has always watched such an application with a wakeful jealousy.

It was among the ordinances of Lord *Bacon*, in the early settlement of the practice of the Court, (*Bacon's Ordinances*, No. 69. 74.) that if both parties join in a commission, and the defendant produces no witnesses, but, afterwards, seeks a new commission, the same shall not be granted; and he shall not have liberty to examine his witnesses, but by special order, and upon some extraordinary excuse for his default; and that no witness should be examined after publication, except by consent, or by special order, *ad informandam conscientiam judicis*. This rule, nearly *verbatim*, we find afterwards adopted in Lord *Coventry's* rules, and in those of the lords commissioners, during the time of the commonwealth, and in those of Lord Chancellor *Clarendon*. (See *Beame's Collection of Orders*, p. 73. 185, 186. 493.) It may be here incidentally remarked, that the *English Court of Chancery* owes almost all the great outlines and permanent principles of its practice to the ordinances of Lord *Bacon*, made, as he expressly declares, for the better administration of justice in his Court. In this respect, he outstripped the wisdom of his age, and anticipated the experience of poster

ity, *as he confessedly did, also, in his knowledge of the laws and limits of the human understanding.

In the case of *The Mayor of London v. Dorset*, (1 Ch. Cas. 328.) Lord *Nottingham* said, that the rule of not examining after publication, had been strict in this point; but he admitted that special cases rested in discretion, for, he said *the Court is the judge*; and, afterwards, in *Newland v. Horseman*, (2 Ch. Cas. 74.) he allowed a commission to examine after hearing; but it was upon a new point which had been raised, at the hearing, by the Court. But we find him again, in *Jones v. Purefoy*, (1 Vern. 47.) taking notice of "what dangerous consequence it would be, if, after publication passed, and people seeing where a cause pinched, they should then be at liberty to look out witnesses to bolster up the faulty part of the cause; the necessary consequence would be perjury."

The successor of Lord *Nottingham* expressed himself with equal decision on the danger and impolicy of these subsequent examinations. The lord keeper, (1 Vern. 253. *Anon.*) declared, that it should be a fixed rule for the future, that on leave to examine after publication, upon making the usual oath of not having seen the depositions, the other side should be at liberty to examine *at large*, as well as to cross-examine the witnesses produced by the party making the motion; and that though it might seem hard that any one should have liberty to examine *at large*, after he had seen his own depositions, yet it was a reasonable *penalty* on such as would not examine in time, but waited until after publication, to take advantage of the other party. Afterwards, in *Cann v. Cann*, (1 P. Wms. 727.) Lord *Macclesfield* observed, that "the prudent methods of this Court were, that after publication is passed, and the purport of the examinations known, neither side is allowed to enter into a fresh examination of the matters in question, since, otherwise, there would be *no end of things, and such a proceeding would tend to perjury as well as vexation." The same doctrine was again declared by Lord *Talbot*, in *Smith v. Turner*, (3 P. Wms. 413.) and that the examining witnesses, after publication passed, especially where it may relate to the matter in issue, was against the rules of the Court, and might be greatly inconvenient, and render causes endless.

The rule, by this time, had become perfectly settled, that if publication has actually passed, the party who meant to enlarge publication, (to use the common, but inaccurate expression,) must show, by affidavit, some *material* witness to be examined, and *satisfactory reasons* why he could not be examined before; and the party, and his clerk, and solicitor, must make oath that they have not seen, or been informed

1817.

HANESLY
V.
LANBERT.

[* 437]

1817.

HANERSLY
V.
LAMBERT.

of, the contents of the depositions, and that they will not, until leave is given, &c., and then the party will be limited as to time, so as not unnecessarily to delay the hearing. This is the rule laid down in the books of practice. (*Gilbert's F. R.* 146. *Wyatt's P. R.* 193. 1 *Harr. Pr.* 503.)

All due precaution is taken by the established course of the Court, that the parties should be warned of the duty and necessity of taking their proof in season; for publication cannot pass until there has been a rule to produce witnesses, and a rule nisi to pass publication, and each of these must be a rule of three weeks. (Rule 20 of the printed rules of this Court.)

It will be seen by the case of *Whitelocke v. Baker*, (13 *Ves.* 511.) that the same principle still prevails in the *English* Chancery. In that case, Lord *Eldon* took occasion to state the principles and practice upon the motion to enlarge publication. "The Court will not," he observes, "enlarge publication (meaning, no doubt, as he falls into the common inaccuracy, that they will not permit testimony to be taken after publication passed) without *a very special case* made. The party's want of knowledge of the rules of proceeding, or want of attention in his solicitor, are not sufficient. The rules of justice are founded upon great general principles, not to be broken down by such circumstances. Even such a motion requires an affidavit that the party, his clerk in Court, and solicitor, have not seen, or been informed of, and that they will not see, or be informed of, the contents of the depositions, until the enlarged time of publication. That is founded upon this, that no more dangerous mode of proceeding can take place, than permitting parties to make out evidence by piecemeal, and to make up the deficiency of original depositions by other evidence. *If, previously to publication*, it appears that there may be occasion for further testimony, and that there is a just opportunity for obtaining it, and it can be had without danger or injustice to other parties, the habit has been to allow the publication to be enlarged upon affidavit." But the Court will not do even that to the prejudice of a party, by delaying the hearing.

My object in thus showing the very great authority and sanction for this rule of practice, has been, to cause it to be better understood and observed. It will, also, have been seen, that this, like other general rules, necessarily has exceptions, which will be allowed when a sense of justice, combined with a sound discretion, shall dictate the case. Many such exceptions, founded on special circumstances, are to be found in the books. If no witnesses have been examined on either side, one great objection is removed, and then the case will depend upon the extent of the negligence and delay at-

[* 438]

tending it. So, on the other hand, if the depositions have not only been published, but *actually seen by the parties*, a still stronger difficulty arises; and the lord chancellor, in the case last referred to, observed, upon such a fact, that though the evidence sought might be "most highly material," he would not dare to *trust himself with laying down a precedent for its admission in such a case.

1817.

EX PARTE
CRUMB.

[* 439]

The present application is not accompanied with any reason whatever, for not examining the witnesses at the proper time, and the motion is, consequently, denied, with costs.

Motion denied. (a)

(a) Vide *Hamersly v. Brown*, ante, p. 428.

Ex parte CRUMB.

This Court may discharge or change a guardian appointed by a surrogate; but it is not done, unless on special cause shown.

PETITION, by *N. Crumb*, guardian of *S. W. Brower*, an infant, stating that he was appointed guardian, by the surrogate of *Otsego*, on the 12th of *January*, 1816; that he is desirous of being discharged from his trust, and praying that his accounts may be referred to a master, and he be discharged.

May 7th.

THE CHANCELLOR. There is no doubt of a competent power in this Court to discharge or change a guardian appointed by the surrogate. It is done in *England*, whether the guardian be one at common law, or appointed by last will and testament; but in the latter case, the Court has required very special reasons for its interference. (In the *Matter of Andrews*, 1 *Johns. Ch. Rep.* 99. *Spencer v. Earl Chesterfield*, *Amb.* 146. *Wyatt*, 212. 1 *Ves.* 160.) Here is no reason assigned why I should discharge this guardian; and, having accepted the trust, he ought not to *be permitted to lay it down when he pleases. I shall require special and sufficient cause for changing or discharging a guardian.

[* 440]

Motion denied.

1817.


MATTER OF
M'FARLAN.

In the Matter of M'FARLAN, a lunatic.

Where it appeared that all the estate of a lunatic had been expended in his necessary maintenance, the Court, on petition of the committee and a report of a master, ordered the lunatic to be delivered to the overseers of the poor of the town.

May 9th.

THE petition of the committee of the person and estate of the lunatic stated, that they had expended all his estate in his necessary maintenance, and had even incurred considerable expense, beyond their means of indemnity; and it appeared, by the report of one of the masters of this Court, that he had examined the accounts of the said committee, and the allegations appeared to be true, by the schedule annexed to the report.

THE CHANCELLOR declared, that the duty of maintaining the lunatic now devolved upon the overseers of the poor of the town where he was legally settled. The statute had prescribed regulations for the overseers in certain cases, on this subject. (1 *N. R. L.* 116. 288.) It was, therefore, ordered, that the committee deliver over the lunatic to the charge and custody of the overseers of the poor of the town.

1817.


 MURRAY
v.
LYLBURN.

*MURRAY and WINTER *against* LYLURN, ISHAM,
SPRAGUE, and DAVIS.

Where a trustee, *pending a suit* against him, for a breach of trust, fraudulently sells the trust estate, and assigns the securities taken for the purchase money, the *cestui que trust* may either take the land, or disregard the sale, and take the bond and mortgage, or other securities assigned. He cannot have both, but must make his election:

Whether the *cestui que trust*, in such case, could take money, negotiable paper, or movable and personal property, the proceeds of the trust estate, and fraudulently disposed of by the trustee? *Quere.*

The assignee of a *chase in action*, takes its subject to all the equity of the original obligor or debtor, at the time, and not to a *latent* equity residing in a third person against the obligee or assignor.

A purchase, *pendente lite*, of the subject matter of controversy, does not vary or affect the rights of the parties to the suit.

But where the purchaser or assignee of the securities had no *actual* notice of the suit, *costs* were not decreed against him.

IN 1809, a bill was filed against *Winter*, who held certain lands in *Cosby's* manor, in trust for *P. Heatly* and others, in behalf of the *cestui que trusts*, charging him with a fraudulent breach of trust, and an *injunction* was issued against him, in *February*, 1810, enjoining from acting as trustee, and from selling any of the trust estate, or assigning the securities or proceeds thereof, &c. (*Vide* vol. 1. p. 26. 60. 77. 566.) *Winter*, notwithstanding, sold a lot of land, part of the trust estate, in *August*, 1810, to the defendant *Sprague*, in fee, and took his bond and mortgage for the purchase money. *Winter*, afterwards, assigned the bond and mortgage to *Robert Lylburn*, deceased, whose *executors*, *Lylburn* and *Isham*, were made defendants. Since the assignment, about 180 dollars, part of the money, had been paid to *Winter*. *Sprague*, afterwards, in 1814, released all his interest in the land so purchased by him, to *Davis*, who is in possession thereof.

May 15th.

*The defendants *Lylburn* and *Isham* denied all knowledge of the sale of the land to *Sprague*, or of the trust; and, according to their knowledge and belief, all notice to their testator, of the suit against *Winter*, and of the injunction; and they averred that he took the assignment of the bond and mortgage, *bona fide*, for a valuable consideration.

[* 442]

The bill was taken *pro confesso*, against *Sprague* and *Davis*.

Gold, for the plaintiffs.

Ely, for the defendants.

1817.

MURRAY
v.
LYLBURN.

Where a trustee, pending a suit against the *cestui que trust*, for a breach of trust, fraudulently sells the trust estate, the *cestui que trust* may either disregard the sale, and take the land, or he may affirm the sale, and take the bond and mortgage, or other securities given for the purchase money. He cannot have both.

[* 443]

The assignee of a *chose in action* takes it subject to all the equity of the original obligor or debtor, at the time of the assignment; but not to a latent equity in a third person against the assignor.

THE CHANCELLOR. The question is, whether the executors of *Lylburn* are to be held accountable to the *cestui que trusts* (in whose behalf *Murray*, as receiver, instituted the suit) for the bond and mortgage, in like manner as *Winter* may be, or would have been, had he not assigned them.

The case states, that the bill has been taken *pro confesso* against *Sprague*, the purchaser, and against *Davis*, who holds under him. It also states, that *Davis* is in possession.

The *cestui que trusts* are not entitled to the land, and also to the purchase money. The two claims, as I observed in the analogous case of *Murray v. Ballou* and *Hunt*, (1 *Johns. Ch. Rep.* 581.) are inconsistent with each other. The one sets aside, and the other affirms the sale. If the *cestui que trusts* choose to disregard the alienation made by the trustee, pending the suit against him, (as they may do, according to the settled doctrines of the Court,) then they have nothing to do with these securities, but are to look solely to the land, taking no notice of the alienation by *Winter*. They ought to be put to their election. I am inclined to think they may, if they please, affirm the sale, and look to these securities; and if they do, then the bill, as against *Sprague* and *Davis*, ought to be dismissed.

It is a general and well-settled principle, that the assignee of a *chose in action* takes it subject to the same equity it was subject to in the hands of the assignor. (2 *Vern.* 691. 764. 1 *P. Wms.* 496. 1 *Ves.* 123. 4 *Vesey, jun.* 21.) But this rule is generally understood to mean the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor. He takes it *subject to all the equity of the obligor*, say the judges in the very elaborately argued case of *Norton v. Rose*, (2 *Wash. Rep.* 233. 254.) on this very point, touching the rights of the assignee of a bond. The assignee can always go to the debtor, and ascertain what claims he may have against the bond, or other *chose in action*, which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and, for this reason, the claim of the assignee, without notice of a *chose in action*, was preferred, in the late case of *Redfearn v. Ferrier* and others, (1 *Dow. Rep.* 50.) to that of a third party setting up a secret equity against the assignor. Lord *Eldon* observed, in that case, that if it were not to be so, no assignments could ever be taken with safety. I am not aware that this decision was the introduction of any new principle, in the case of actual *bona fide* purchases or assignments *by contract*; though Lord *Thurlow* said, in one case, (1 *Vesey, jun.* 249.) that the purchaser of

a *chose in action* must abide by the case of the person from whom he buys; but he spoke this on a question between the assignee and the debtor. In assignments, by *operation of law*, as to assignees of bankrupts, the case may be different; for such assignments are said to pass the rights of the bankrupt, subject to all equities, and precisely in the same plight and condition as he possessed them. (1 *Atk.* 162. 9 *Vesey*, *100.) The ground, however, on which I place the right of the *cestui que trusts*, in this case, to pursue the bond and mortgage in the hands of the assignee of *Winter*, is the constructive notice to all the world, arising from the bill and supplementary bill, filed in 1809, against *Winter*, for a breach of trust. The object of that suit was to take the whole subject of the trust out of his hands, together with all the papers and securities relating thereto. If *Winter* had held a number of mortgages, and other securities, in trust, when the suit was commenced, it cannot be pretended, that he might safely defeat the object of the suit, and elude the justice of the Court, by selling these securities. If he possessed cash, as the proceeds of the trust estate, or negotiable paper not due, or perhaps movable personal property, such as horses, cattle, grain, &c., I am not prepared to say the rule is to be carried so far as to effect such sales. The safety of commercial dealing would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce; and they formed one of the *specific* subjects of the suit against *Winter*, and the injunction prohibited the sale and assignment of them as well as of the lands held in trust. If the trustee, pending the suit, changed the land into personal security, as he did in this case, I see no good reason why the *cestui que trusts* should not be at liberty to affirm the sale, and take the security; and whoever, afterwards, purchased it, was chargeable with notice of the suit. He was dealing with a subject out of the ordinary course of traffic, and always understood to be subject to certain equities; and there can be very little ground for the complaint of hardship in the application to such a case, of the general doctrine of the Court. There is no principle better established, nor one founded on more indispensable necessity, than that the purchase of the subject matter in controversy, *pendente lite*, does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation. *The latent equity here might easily have been discovered by *Lylburn*, when he purchased, by applying to the records of this Court. If the *cestui que trust* be entitled, as between him and his trustee, to take the securities or the land, at his election, it ought not to be in the power of the trustee to defeat that election, by selling the securities. The liti-

1817.

MURRAY
V.
LYLBURN.

[* 444]

Whether the *cestui que trust* could take money, negotiable paper, or movable personal property, the proceeds of the trust estate, fraudulently disposed of by the trustee? *Quære.*

A purchase, *pendente lite*, of the subject matter of controversy, does not vary or affect the rights of the parties to the suit.

[* 445]

1817.

MURRAY
V.
LYLBURN.

gating parties are not to have their rights affected by any alienation during the pendency of the suit.

This doctrine was fully considered, and the authorities reviewed, in the case of *Murray v. Ballou*, (1 *Johns. Ch. Rep.* 566.) and I do not know that it is in my power to add any thing material to what was there said. That case must be considered as the established law in this Court. If it were necessary to give further proof of the uncontradicted existence and uniform support of the rule, I might refer to the ancient rule at law, (*Jackson v. Ketchum*, 8 *Johns. Rep.* 479.) that a purchase of land, pending a suit concerning it, was champerty. It was also the maxim of the common law that *pendente lite nihil innovetur*. In the recent case of *Metcalf v. Pulvertoft*, (2 *Ves. & Beame*, 200.) the *English* vice chancellor reviewed the cases, and vindicated this doctrine. So, in the case of *Gaskell v. Durdin*, (2 *Ball & Beatty*, 167.) the present lord chancellor of Ireland declared the rule, in the following clear and emphatical language: "The rule of this Court undoubtedly is, that any interest acquired in the subject matter of a suit, pending the suit, is so far considered as a nullity, that it cannot avail against the plaintiff's title; and if this rule were not attended to, there would be no end to any suit; the justice of this Court would be evaded, and great hardship and inconvenience to the suitor necessarily introduced. It is extremely difficult to draw any line, and very dangerous to allow of the rule being frittered away by exceptions."

[* 446]

I shall, accordingly, decree, that the plaintiffs, by their solicitor, signify, by an election in writing, signed by such *solicitor, and filed in the register's office, their determination whether to proceed against the defendants *Sprague* and *Davis* for the land, or against the defendants *Lylburn* and *Isham* for the bond and mortgage mentioned in the pleadings. That if such election be to proceed against the defendants *Sprague* and *Davis*, then the bill, as against the defendants *Lylburn* and *Isham* shall, from the time of filing such writing, stand dismissed; and the defendants *S.* and *D.* shall, within thirty days, convey the lot in the pleadings mentioned to the present trustees, &c., and pay the costs of the suit against them; but that if such election be to proceed against the defendants *Lylburn* and *Isham*, then the bill, as against the defendants *Sprague* and *Davis*, shall, from the time of filing such writing, stand dismissed, and the said defendants *Lylburn* and *Isham* shall, within thirty days from the service of a copy of this decree, and of such election, at their own expense, reassign and deliver to the said solicitor, or his order, for the use of the *cestui que trusts*, for whose benefit this suit was instituted, the said bond and 344

mortgage, together with all the right and interest of their testator, at the time of his death, therein, and shall also pay the sum of 157 dollars and five cents, which they have admitted, by their answer, to have been received by their testator, on the bond and mortgage, subsequent to the assignment thereof, together with lawful interest thereon, from the 30th of *November*, 1811, when it was received; and that if the plaintiffs shall not make and file their election, as aforesaid, within forty days from the date of this decree, then the bill, as to all the defendants, shall be dismissed.

As to the question of costs, I have not charged the executors with costs, because there is no evidence that their testator purchased the securities under any other than constructive notice of the suit against *Winter*; and actual notice is denied. The case, therefore, falls within the decision in *Murray v. Ballou*. But *Sprague* and *Davis* are *made chargeable, in one event, with costs, because they are charged with notice, in fact, of the suit and injunction, and they have admitted it, by suffering the bill to be taken *pro confesso*. And in the cases in which the bill is to be dismissed, there having existed a just cause of suit, which is lost only in consequence of an election, or a default founded upon the direction in the decree, the defendants, even then, will have no equity to entitle them to the costs of the suit, and the dismissal is to them a favor.

Decree accordingly.

N. B. In the suit by the *same plaintiffs* against *Lylburn*, *Lham* and *Shepherd*, a similar decree was entered, except in regard to *Shepherd*, who, not being charged with actual notice of the *pendency of the suit* against *Winter*, was not decreed to pay costs.

In the suit, also, by the *same plaintiffs*, against *Hardenbrook* and *Roma*, on a similar case, there was the like decree as to *Hardenbrook*, the assignee; but as to the defendant *Roma*, who purchased *before* the suit brought against *Winter*, the chancellor held that his title was not affected by it, and dismissed the bill as to him, unconditionally, and with costs.

1817.

MURRAY
V.
LYLBURN.

But where the purchaser, or the assignee of the securities, had no actual notice of the pendency of the

[* 447]
suit, costs will not be decreed against him.

1817.

ADSIT
v.
ADSIT.

*E. ADSIT *against* ABIGAIL ADSIT.

Where a testator gave to his wife 500 dollars, "to be left in the hands of his executors, to be paid to her for her support, at any time, or at all times, as her need might require;" and, also, gave her what household goods she needed; and, after bequeathing pecuniary legacies to his grandchildren, directed his farm, &c. to be sold by his executors, who sold it for 6,000 dollars, and the wife, after the death of the testator, accepted the *legacy*, which was paid to her out of the proceeds of the sale of the farm: it was held, that the legacy was not, according to a fair construction of the will, given in lieu of, or in bar of, *dower*, but as a mere pecuniary bequest. That the acceptance of it by the widow did not affect her right to dower; and that the purchaser of the farm took it subject to the claim of dower.

Where a legacy to the wife is not declared, by express terms, to be in lieu of dower, it will not be so intended, unless such intention can be deduced, by clear and manifest implication, from the provision of the will, so that the claim of dower would be inconsistent with the will, or repugnant to the dispositions made by the testator. It must, in fact, if admitted, disturb and defeat the will.

May, 10th.

SAMUEL ADSIT, deceased, in his lifetime, was seised of a farm in *Dutchess* county, and the plaintiff, who is his grandson, lived with him several years, in order to manage the farm, and take care of him and his wife, they being very aged. In *November*, 1813, *S. A.* leased the farm to the plaintiff during the life of *S. A.*, and for one year thereafter; and the plaintiff and *S. A.* entered into articles of agreement, under seal, by which *S. A.* covenanted to bargain and sell the farm to the plaintiff, on his paying, within one year after the death of *S. A.*, 6,000 dollars to his executors, who should then convey the farm to the plaintiff. The plaintiff continued in possession of the farm, under the lease, until the death of *S. A.*, in *April*, 1806. By his *will*, made the 24th of *January*, 1805, *S. A.* gave to his wife 500 dollars, "to be left in the hands of his executors, to be paid to her, for her support, at any time, or at all times, as her need might require." He also gave to her what household goods she might need; *and gave to his three grandsons, by name, (the plaintiff being one,) 325 dollars each; and to his five granddaughters, by name, each 175 dollars, to be paid after the sale of the farm; and, after the payment of all debts and legacies, he directed the *residue* to be divided into six equal shares, which he distributed among his children and grandchildren, &c. He also directed his movables to be sold as soon as convenient, and his farm to be sold within one year, and the money to be paid to the legatees, as the executors might think proper.

[* 449]

The plaintiff, after the death of *S. A.*, continued in possession of the farm, and, having paid to the executors the 6,000 dollars, they, on the 11th of *April*, 1807, conveyed to him the farm, being 303 acres, in fee. The personal estate of the testator, after paying his debts, was insufficient to pay any part of the legacies, all of which, there being no other real estate, depended on the sale of the farm. The bill stated, that the defendant knew of the lease, the agreement, the will, and the sale to the plaintiff, by the executors, and made no objection, nor claimed any dower, but accepted the legacy, which was paid to her out of the proceeds of the real estate. That the defendant was 91 years of age, and claimed her dower in the farm, and had brought actions at law to recover it, and the suits were proceeding against the plaintiff, and *J. C.*, to whom he had sold part of the farm. The bill prayed for an injunction to stay the suits at law, and that the defendant might be barred of her claim of dower, &c. An injunction was issued according to the prayer of the bill.

1817.

ADMIT
V.
ADMIT.

The defendant, in her answer, filed the 20th of *September*, 1815, admitted the material facts stated in the bill, but alleged that she explicitly stated, when the deed was given to the plaintiff, that she intended to claim her dower, and that she never declared herself satisfied with the provisions *in the will; that she received a part only of the legacy, 367 dollars, not in lieu of dower, but stated, when she received it, that she should claim her dower, if necessary.

[* 450]

H. Bleecker, for the defendant, on the merits stated in the answer, now moved to dissolve the injunction. He contended, that the testator had not declared, in express terms, nor was it to be collected by necessary implication from the provisions in the will, that the legacy to the defendant was to be in lieu of dower; and, consequently, that the defendant was not to be put to her election, but was entitled to the testamentary provision, and, also, to her dower at law. He cited *Co. Litt.* 6. note 227. by *Hargrave*. 1 *Johns. Rep.* 307. 2 *Vernon*, 365. 1 *Lord Raym.* 438. 8 *Mod.* 152. *Ambler*, 682. 8 *Vin. Abr.* 366. *Prec. in Ch.* 133. 1 *Bro. Ch. Cas.* 292. 2 *Bro. Ch. Cas.* 347. 362. 3 *Woods.* 493 3 *Vesey*, 149.

May 19th.

J. Tallmadge, contra. He objected to the motion, at this time, as the cause was at issue, and parol proof had been taken, the effect of which, on the question arising in the will, could not be determined, as the proof was not before the Court.

1817.

ADBIT
V.
ADBIT.

THE CHANCELLOR. This is a motion to dissolve the injunction on the coming in of the answer.

The question on the will is, whether the defendant is entitled to her dower, as well as to her legacy; if not, then whether she is still entitled to her election, notwithstanding a considerable part of the legacy has been received.

I am not prepared to say what effect parol proof may have on this question; and, therefore, I shall give the plaintiff an opportunity to bring the cause to a hearing before I dissolve the injunction; but I have no difficulty, in the mean time, in saying, that there does not appear to be any thing in the will itself to bar the widow, or to put her to her election.

[* 451]

If the legacy is to be taken in lieu of dower, I should think that the defendant is entitled to her election, notwithstanding her acceptance of the legacy; for it is evident that she did not, in that case, act with a proper understanding of the consequence of that acceptance, but was under mistaken impressions. (*Wake v. Wake*, 1 *Vesey*, jun. 335.)

The legacy is not declared, by any express words in the will, to be in lieu of dower. The inquiry, then, is, whether such an intention in the testator, is to be collected by clear and manifest implication from the provisions in the will. To enable us to deduce such an implied intention, the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them. It must, in fact, disturb or disappoint the will. This appears to be the result of an historical review of the cases upon this greatly agitated subject. According to this test, the defendant is entitled to her dower as well as to the legacy; for every bequest can take effect, and every disposition of the will be fulfilled, consistently with the operation of the claim of dower. The direction given in the will to sell the farm, is not, of itself, a circumstance that is to alter this construction; for it is well understood, that the purchaser takes the estate subject to that claim. The title to dower is paramount to the testator's title, and he has no control over it. All the cases, however irreconcilable they may be in other respects, agree in this, that a devise of the lands to trustees to sell, or a direction to the executors to sell, is understood to pass the estate subject to dower. There is no inconsistency between the execution of such a power and the claim of dower. There is no pretence even of hardship in this case upon the testator's grandson, who now comes forward to repel the claim, because the purchase of the farm was in pursuance of a contract made with the testator, and for a price agreed on, long before he made his will. The parties must have understood the contract as referring only to the testator's right,

[* 452]

and that the land would pass *cum onere*, or subject to the well-known contingency of dower.

The bequest of a sum of money to the wife, is never admitted to be, of itself, and unconnected with other circumstances, a substitute for dower. It is considered a voluntary gift, and does not affect her legal rights. Every devise or bequest imports bounty, and does not naturally imply satisfaction of a pre-existing encumbrance. But there is one expression in the will which may seem to mark a design, in the testator, to give the 500 dollars in lieu of dower, and that is, the declaration that it was to be paid her, *for her support*. If this contains sufficient evidence of a clear, unambiguous intention in the testator to substitute that legacy for the dower, then the defendant ought to be put to her election; for if she takes a benefit under the will, she must conform to it, in all respects, as far as she is able. It would be unconscientious in the wife to take the dower, and, also, what the testator intended to be in lieu of it. The great point here is, Does the gift of the 500 dollars furnish clear and undoubted evidence of such intention? May not this sum have been intended as auxiliary support, and not as an entire and only provision for her maintenance? It was a provision far inferior in value to her dower. It was a very inadequate support for her during life. The sum is not given absolutely, out and out, but is to be *left in the hands of the executors*, and to be paid to her *as her need might require*. The better opinion is, that it was intended as a mere gratuity, or as a cumulative provision, and created for greater caution. A well-rooted and anxious affection would naturally have made this small pecuniary provision for the better comfort of an aged wife, without any intention of depriving her of her more ample and valuable common law resource. The *fact that the testator gives her also the requisite *household goods*, shows that he contemplated her ability, and, perhaps, desire to live by herself. I cannot find, in this bequest, evidence sufficient to satisfy my mind of a certain or manifest intention that it should be in lieu of dower; and the acceptance of it is not inconsistent with the claim of dower, nor is the assertion of that claim repugnant to, or destructive of, any provision in the will.

The weight of the authorities applicable to this case, is decidedly in favor of the widow's claim to dower, notwithstanding the bequest.

In *Lawrence v. Lawrence*, (2 Vern. 365. 1 Eq. Cas. Abr. 218, 219.) the testator devised some personal legacies to his wife, and also devised to her part of his real estate, of the yearly value of 130*l.* during her widowhood, and the remainder of his whole estate he devised to the plaintiff. It

1817.

ADST
V.
ADST.

[*,453]

1817.

ADBIT
v.
ADBIT.

was held by Lord Chancellor *Somers*, that though what was given to the wife was not declared to be in lieu of dower, yet it might be plainly collected from the will that it was so intended, because the testator devised all other his real estate to other uses; and he held the widow to her election, between the dower and the devise.

It is to be observed, that the lord chancellor put the case upon a *plain intent* to substitute the provisions in the will, for the dower. Whether he was or was not mistaken in his inference, yet the ground he took was correct, in requiring a manifest intention to bar the dower. That case was also much stronger than the present, for there was not only a pecuniary bequest, but a devise of an interest in the land. But this decree of Lord *Somers* was, afterwards, on a rehearing before Lord Keeper *Wright*, in 1702, reversed, because it did not appear that the testator intended to bar the wife of her dower. The same point, under the same will, in 1715, came before Lord Chancellor *Cowper*, who concurred in opinion with the lord keeper; *and that last decree was affirmed, on appeal to the house of lords. (1 *Bro. P. C.* 591.)

[* 454]

The next case, in the order of time, was that of *Hitchin v. Hitchin*. (*Prec. in Ch.* 133. 2 *Vern.* 403.) The testator devised certain lands to his wife for life, without saying more, and devised the residue of his lands to other purposes. The decision of Lord *Somers*, in *Lawrence v. Lawrence*, which was made the year before, was urged against the widow's claim of dower in the lands devised to others, and that decision had not then been reviewed and reversed. But the lord keeper held, that the devise was not to be looked upon as any recompense or bar of dower, but as a voluntary gift. In *Lemon v. Lemon*, (5 *Geo. I.* 8 *Viner*, 366. *Pl.* 45.) the testator devised lands to his wife for life, which were of more value than her dower, but not devised to her expressly in lieu of dower; and he devised other lands to his brother, in which the widow claimed her dower. Lord Chancellor *Parker*, on the strength of the case of *Lawrence v. Lawrence*, as settled in the house of lords, held, that the widow was entitled to her dower, notwithstanding the devise.

These several cases established the rule, that not merely a pecuniary bequest, but even a devise of lands, though for life, and though of greater value than her dower, was not to be taken in bar of dower, unless so expressed. Lord *Camden* admitted, that these cases were good law, because the will, in all those cases, was consistent with the claim of dower. The dowable estate was devised generally, and passed *cum onere*. But since those decisions, a very interesting discus-

sion has arisen, and been continued through several of the cases, on the effect of an annuity given to the wife for life, and charged upon the dowable estate.

Lord *Hardwicke* appears to have considered the annuity as no bar, according to the imperfect note of the case of *Pitts v. Snowden*, (cited in *App. to 1 Bro. Ch. Cas.* in *2 *Vesey, jun.* 579. and 3 *Vesey, jun.* 252.) the testator gave his wife an annuity of 50*l.*, chargeable upon the lands upon which dower was sought, with a power of entry and distress, and which lands he devised to his children, and the widow was held entitled to both. But in *Arnold v. Kempstead*, (*Amb.* 466.) a contrary decision seems to have been made. In that case, the testator gave his wife certain leasehold houses, for life, and an annuity of 10*l.* during widowhood, and then disposed of all his freeholds, *subject to that annuity*. Lord Chancellor *Northington* considered, that here was a manifest intention of the testator to give the annuity in satisfaction of dower, as the lands were devised subject to that annuity, and the claim of dower would be in contradiction to the will.

The general doctrine, in this case, was perfectly sound, whatever may be thought of its application. The case of *Lawrence v. Lawrence*, as finally settled, was admitted to be the rule; but here the intention was held to be *manifest*, and the claim of dower in *contradiction* to the will. The case of *Villaval v. Galway*, (*Amb.* 682. 1 *Cruise's Dig.* tit. Dower, ch. 5. sec. 33. S. C.) was decided soon after, by Lord *Camden*, by whom all the cases were ably examined, and he went largely into the argument, to show that the annuity was inconsistent with the claim of dower. In that case, the will gave the wife an annuity of 200*l.* with a power of entry and distress; and, subject thereto, he devised his estates in trust for his daughter. The lord chancellor followed the case of *Arnold v. Kempstead*, and, in opposition to that of *Pitts v. Snowden*, held, that a rent charge given to the widow, issuing out of the estate, subject to dower, and with power of distress, was a bar of dower, because such a claim would disappoint or disturb the will, and be inconsistent with it. As an annuitant, the widow must be out of possession of the whole land, and, as dowress, she must be in possession of part. The trustees could not hold the whole, subject to the annuity *and distress, without being in possession of the whole; and they were to hold the whole in trust, and for the widow, as an annuitant. But the claim of dower would put her in possession of a part, and sink so much of the annuity; whereas, the very gift of an annuity, chargeable upon the real estate, does, from the nature of the interest, throw her out of possession; and, by this course of reason-

1817.

ADMIT
V.
ADMIT.

[* 455]

[* 456]

1817.

ADBIT
v.
ADBIT.

ing, the chancellor undertook to prove, that the claim of dower was inconsistent with the will, and that the acceptance of the annuity barred the dower. In *Jones v. Collier*, (*Amb.* 830.) decided by Sir *Thomas Sewell*, as master of the rolls, these two latter decisions, on the effect of an annuity to bar dower, in the lands on which it is charged, were followed. So also, Mr. *J. Buller*, when setting for the lord chancellor, in *Wake v. Wake*, (*3 Bro.* 255. 1 *Vesey, jun.* 335.) followed the same decisions, on the same question.

In the subsequent cases it would appear, however, that even this doctrine of holding the wife barred by an annuity charged upon the real estate, is questioned and shaken, and finally overruled.

Thus, in *Pearson v. Pearson*, (*1 Bro.* 292.) land was devised to the son, subject to an annuity to the wife, and the question was, whether this rent charge to the wife was a bar of her dower, without being so expressed. Lord *Rosslyn* held the law to be settled, that the gift of an annuity to the wife, might or might not be a bar, according to the language of the will. If the value of the land should not be sufficient to satisfy the annuities, and the dower, it would prove an intention to bar the dower, otherwise, there was nothing in the will to show such an intention, and the cause stood over to inquire into the value of the land; and it was agreed that if it was not sufficient to satisfy both, the widow must elect. Again, in *Brown v. Perry*, (*Dickens*, 685.) according to a short and imperfect note of the case, Lord Ch. *Thurlow* restored, in full vigor, the *efficacy of the ancient authorities. The testator devised to his wife some particular estates for life, and also bequeathed her specific parts of his personal estate, and he held that she was not barred by the acceptance of the devise and bequest. The law gave her dower, and what her husband gave her was an addition. In *Foster v. Cook*, (*3 Bro.* 347.) Lord *Thurlow* held, that even an annuity to the wife for life, and charged upon the real estate, in the hands of trustees, was no bar of dower, which was paramount to the will. This was in direct contradiction to the cases already mentioned in favor of the bar arising from the annuity; and it is the more striking, as these cases were cited by the counsel, and pressed upon his lordship's attention. The decisions of Lord *Hardwicke*, and of Lord *Thurlow*, are thus placed in direct opposition to the intermediate decisions on this point of the annuity.

In the recent cases, this whole subject has received a further investigation, and they will be found to be extremely interesting on this greatly litigated rule of construction.

The case of *Straham v. Sutter*, (*3 Vesey*, 249.) came before Lord *Alvanley*, as master of the rolls. There was a de-
352

[*457]

vise to the wife of 20 guineas, "for her immediate support and maintenance," and an annuity during her widowhood, and a gift also to her, of the household furniture, and the testator's stock in trade. He devised his real estate to his son, and directed the rents and profits to be applied to his education.

This case is considerably analogous to the one now before me, and, I think, would afford a much stronger inference against the right to dower.

Lord *Alvanley* held, that the claim of dower was not inconsistent and irreconcilable with the devise to the son, and that it was not a necessary inference that the testator intended that the devisee should take it unencumbered by the dower of the wife. The annuity, in this case, was not *charged upon the premises of which the wife was dowable, and, therefore, it was not exactly like the cases in *Ambler*. The gift of an estate out of which the widow was dowable, did not prevent her from taking any other estate the testator thought proper to give her; and he recognized the authority of the elder cases, by which the gift of an estate to a third person did not exclude the wife from claiming dower out of it. He concluded that the widow in this case was not barred. In *French v. Davies*, (2 *Vesey*, jun. 572.) Lord *Alvanley* had previously gone, still more minutely, into an examination of all the cases on the subject. A devise of all the estate was made to the wife and others, in trust to sell, and great benefits were given to the wife out of the proceeds. This presented a very strong case in support of the inference, that the testator meant to bar the dower, but he ruled otherwise. In the three cases from *Ambler*, the demand of the annuity was out of the same estate as the dower, but here the claim was out of a fund composed of the produce of the real and personal estate mixed together; and the master of the rolls held, that merely directing the estate to be sold was not a bar, for the wife might take her dower out of the purchase money. He did not, therefore, expressly contradict the authority of the cases in *Ambler*, though he evidently would have done so, if necessary, by preferring, as he did, the old and the modern cases, which were irreconcilable with those intermediate decisions. It appeared to him, that here was no manifest and certain intent to bar the dower, though he believed the husband would have imposed such a condition, if he had recollected the dower. But the husband had not done so, and there was no clear, incontrovertible result from the will, that he meant to exclude her; no legacy would be disappointed. The dower and all the dispositions could stand together. There was no repugnancy between the dispositions in the will and the dower. The only argument

1817.

AD SIT
V.
AD SIT.

[* 458]

1817.

ADBIT
v.
ADBIT.

was, that the estate would not sell for so *much as if dower was not insisted on, but that was no reason why a person taking a legacy was to be prevented from setting up an encumbrance.

In *Greator v. Cary*, (6 *Vesey*, 615.) the testator had given to the wife 150*l.* a year, during her widowhood, and charged it on the real and personal estate. He also bequeathed to her his household goods, &c., and devised the residue of his estate to his sister. This brought up again the effect of the annuity on the claim of dower; and the present master of the rolls, Sir *Wm. Grant*, decided the case in her favor, upon the authority of *Foster v. Cook*, and held that here was no repugnancy, and that it did not appear clearly that the testator meant so to dispose, that if she should claim dower, it would disappoint the will.

The subject was brought under the consideration of Lord *Redesdale*, in *Birmingham v. Kirwan*, (2 *Schoales & Lefroy*, 444.) and he said the clear deduction from all the cases was, that the intent to exclude the right of dower by a voluntary gift, must be demonstrated by express words, or by clear and manifest implication, and this implication must arise from some provision in the will, inconsistent with the assertion of the claim. He ruled, accordingly, in the case before him, that a devise to the wife of a house and 170 acres for life, at a low rent, and with directions to keep it in repair, was inconsistent with the assertion of a right of dower in the same lands, but not inconsistent with a claim of dower in the rest of the estate which he had devised to others; and he put the wife to her election as to the one tract, and allowed her claim as to the rest of the estate. He admitted that a devise of the house, &c. simply to trustees, might be subject to dower, but that the special directions concerning it, rendered the claim inconsistent with the dower. The dower would be inconsistent with her own title to one third; and upon the authority of the distinction in this case, the vice chancellor of *England*, in *Dorchester v. Effingham*, (*Cooper's Eq. Rep.* 319.) *confined the claim of dower to the residue of the estate, but disallowed it as to a part, in the case where the testator had devised a legacy to the wife of 500*l.*, and a house and 53 acres, part of his real estate. He said he would not undertake to conjecture that a testator meant what he had not said, though it was probable the testator had not any intention, one way or the other, as to dower out of the rest of his estate.

[* 460]

I have thus reviewed the principal cases on this subject, and, though many of them may not be entirely applicable, I thought it would be useful to examine the question, on the ground of authority, in all its bearings, and to show the leading principle which uniformly pervades the cases. The re-
354

sult clearly is, that there is not a single case that contradicts the defendant's claim ; but, on the contrary, if the question under this present will had been the one in any of those cases, there would probably not have been a moment's doubt or difficulty in the minds of any of the learned men who have bestowed such pains and talent in their discussions.

The only color that can be given to the plaintiff's claim, must, then, arise from the proof which may have been taken in the cause ; whether admissible, and, if so, what effect it ought to have, I cannot now say ; and, in order to have that part of the case discussed, I shall, for the present, deny the motion, with liberty to the defendant to renew it, if the plaintiff does not set down the cause for hearing at the next term.

Motion denied.

1817.

DEMAREST
V.
WYNKOOP.

*DEMAREST and wife *against* WYNKOOP and others.

[* 461]

Proceedings in a suit in this Court will not be stayed, on motion, until the costs in certain suits at law, between the same parties, relating to the same subject, in which the plaintiffs had been nonsuited, or verdicts found against them, be paid, by the plaintiffs.

The rule applies only when both suits are in the *same* Court ; or, at least, in Courts of the *same* nature, and proceeding in the *same* manner, and on the *same* principles, either at law or equity.

HENRY, in behalf of the defendants, moved, that all further proceedings in this cause, on the part of the plaintiffs, be staid, until the costs of certain suits in ejectment, in the Supreme Court, were paid. He read an affidavit, stating that the plaintiffs commenced an action of ejectment at law, in 1809, against the defendant *Wynkoop*, on which a verdict and judgment were obtained for the defendant *W*. That, in 1811, the plaintiffs commenced ejectments at law against the defendants *Dubois* and *Astor*, in each of which suits the plaintiffs were nonprossed. That the defendants became entitled to the costs of those suits, which have not been paid, and that the plaintiff *Demarest* was, and still is, insolvent. That the bill sets up some claim of title to certain portions of the land, under pretence of which the ejectments had been prosecuted. That the cause is at issue in this Court, and testimony taken.

June 2d.

H. Bleeker, contra.

1817.

DEMAREST
v.
WYNKOOP.

[* 462]

THE CHANCELLOR. A similar application was made in the case of *Wild v. Hobson*, (2 *Vesey & Beame*, 105.) and Lord *Eldon* said, the principle of staying one action until the *costs of a former action between the same parties on the same subject matter, were paid, had never been applied. where the one suit was in equity, and the other at law. In all other cases, if the two suits had not been in the same Court, yet they were in Courts of the same nature, and proceeding upon the same principles, and in the same mode. Thus, in *Melchart v. Halsey*, (3 *Wils.* 149.) a suit in the C. B. was stayed, until the costs of a former suit in the K. B. were paid; and in *Holbrooke v. Cracraft*, (5 *Vesey*, 706. note.) the Court of Chancery required the costs of a former bill between the same parties in the exchequer to be previously paid. The interference has, in no instance, been carried further. There is a great distinction between legal and equitable jurisdictions, as to the mode of proof, the mode of trial, and the nature of the relief. Such a change in the remedy does away the presumption of vexation. The party having tried the question at law, may apply to the defendant's conscience; and Lord *Eldon* says, it was never asserted, that a plaintiff must not bring an ejectment until he has filed a bill, and he thought it might be productive of mischief to apply the principle to this case.

On the strength of the reason and authority of that case, and in the absence of all practice and precedent to the contrary, I shall deny the motion, but without costs.

Motion denied.

1817.

BELKNAP
V.
BELKNAP.

*C. BELKNAP and others *against* D. BELKNAP and others.

Under the *act for draining swamps and bog meadows, in the counties of Orange and Dutchess*, passed the 9th of April, 1804, (secs. 27. ch. 91.) the *inspectors*, appointed by the Court of Common Pleas, for draining the *great swamp* or bog meadow, near *Newburgh*, must strictly observe the precise limits prescribed by the act; and can only *continue* the *main ditch* dug for that purpose, at the north end of the *great pond*, through lands *adjoining* the swamp: they have no authority to dig down the *outlet*, at the southeast end of the pond, and thereby injure or destroy valuable *mills*, &c. erected on the *outlet*, and on land not adjoining the great swamp, or to break up ancient and useful streams of water, by draining the natural reservoirs which feed them. And if they exceed their power, in this respect, this Court will grant a perpetual injunction to restrain all proceedings touching the *outlet* of the pond, and for *quieting* the plaintiffs in the enjoyment of the water for their mills, &c.

THE plaintiffs are seised of lands in *Newburgh*, adjoining the east side and south end, and including part of a small lake or pond, called the "*Great Pond*," lying on both sides of the *Passaick creek*, or *outlet* of the pond; and have, on the *outlet*, about 70 rods distant from the pond, a grist-mill and a saw-mill. One of the plaintiffs, *C. B.*, is also seised of a farm of 200 acres, with valuable mills and factories thereon, worth about 20,000 dollars, situate about four and a half miles from the pond, and one and a quarter mile from the *Hudson*, which he holds in trust for the other plaintiffs and himself; and the stream of water from the pond contributes materially to the use of the last-mentioned mills, and gives them their chief value. The level of the pond is about 18 feet above the low lands east of it, and distant about 80 rods, and the average depth of the pond is 13 feet. There is a dam erected across the outlet, for the use of the first-mentioned mills; the water, at the dam, being about six feet, and the fall below about 10 feet. The bill, also, stated, that the *pond* had immemorially served for the use of the mills, &c.; and that a dam and mill had been kept up there for above 20 years past; and that the *outlet*, dam, &c. were improved for the mills below. That the plaintiffs, in 1809, purchased the mills and *dam* at the outlet, and made great improvements, chiefly with a view to the mills, &c. situate four and a half miles below. That the pond was one and a half mile long, and one mile broad, and covered about 400 acres; that the *great swamp* or *bog meadow*, lies north of the pond, and the pine swamp south of it.

June 9th.

[* 464]

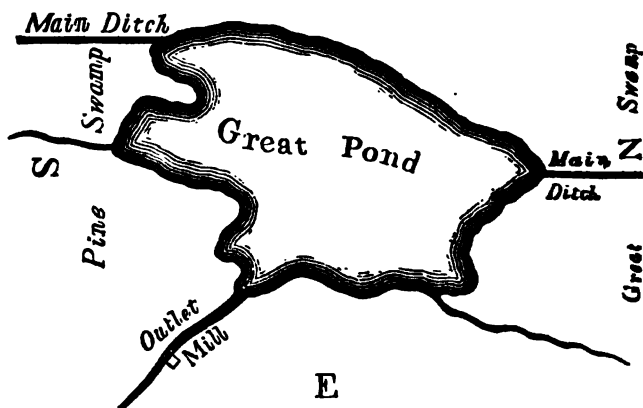
1817.

BELEKNAP
V.
BELEKNAP.

[*465]

That in 1811, the defendants, and others, claiming to be proprietors of part of the *great swamp*, and desirous to have the same ditched and drained under the *act making provision for draining swamps and bog meadows, in the counties of Orange and Dutchess*, passed the 9th of *April, 1804*, (sess. 27. ch. 91. s. 1. 6.) presented a *petition* to the Court of Common Pleas of *Orange* county, pursuant to the directions of the first section of the said act; that there was an offer to show cause against the application; but the Court granted the petition, and appointed *five inspectors*, four of whom acted; and, on the 10th of *September, 1813*, made a *report*, that they had surveyed the *swamp*, and deemed it practicable to drain it, and profitable to the proprietors, and had determined the number of acres of each proprietor to be benefited, and made a *map* (a) of the tract and *the course of the ditches to be cut, and assessed the sums to be paid by each proprietor, and described the course of the ditches requisite to be cut, and kept open; and they added: "We find it necessary to continue the main ditch through lands adjoining the said tract of swamp or bog meadow, for the purpose of draining the same more effectually, viz. through what is called *the outlet of the great pond*, at the place where the gate is erected, to extend the course the said outlet naturally runs, easterly, about 21 chains, to the low lands or swamp below the pond, to be cut 16 feet wide and 10 feet deep, and that the lands through which this last ditch was to be continued were owned by *C. B.* and others, (the plaintiffs.) and that they could not agree with them as to the damage."

(a) The following diagram, taken from the map exhibited in the cause, will serve to elucidate the facts in the case.



They, therefore, applied to the Court to appoint *appraisers*, pursuant to the sixth section of the act.

The bill further stated, that the main and branch ditches in the *great swamp* to the north, and in the *pine swamp* to the south of the pond, are calculated and intended to drain the waters thereof into the *great pond*. That those swamps cannot be effectually drained by leading the waters thereof into the great pond; as the pond, from its elevation, is incapable of receiving the waters necessary to be drained off, unless the pond itself is considerably lowered, or, in a great degree, drained and thereby materially to diminish the value of the plaintiffs' mills, &c. That to enlarge the outlet of the great pond, and cut it down, in the manner the inspectors have reported, would prostrate the dam, and, in a great degree, drain the pond; that the inspectors consider such reduction as a *continuation* of the *main ditch*, whereas the outlet is at the *southeast* end of the pond, about one mile, on a direct line across the pond, from the place where the *main ditch* strikes the pond, at the north end. That the land of the plaintiffs, at the outlet, does not *adjoin* the *great swamp*, though it does *adjoin* the *pine swamp*; and the lands of the plaintiffs, at the outlet, extend into the pond, about 15 chains. That the pond is a never-failing source of water to all the mills below, and that draining the swamp, in the manner proposed, would destroy the benefit of the water to the mills. That, according to the report, the number of acres to be benefited by the draining and ditching, is 1210 acres, and the sum assessed to be raised is 4840 dollars, out of which the damages are to be paid; that the damages of the plaintiffs, by the operation, would be 5000 dollars for the first farm, and 10,000 dollars for the second farm, &c. held by C. B. in trust for himself and the other plaintiffs. That the act of the legislature does not warrant any such draining of the pond, nor the cutting any ditch that does not commence on the bog meadow, and be, from necessity, *continued* therefrom through the land adjoining; nor does it authorize touching the dam, &c. at the *outlet*. That the inspectors exceeded their powers under the act; that their report was, therefore, null, and ought not to have been confirmed by the Court. That the Court proceeded on the ground, that the report was final and conclusive, and could not be revised by them, and they accordingly appointed three appraisers. That the appraisers are proceeding in the appraisal, and threaten to cut the ditches, &c. The bill prayed, that the proceedings touching the outlet of the pond might be declared null; that the rights of the plaintiffs might be declared, and they be quieted in the enjoyment thereof; that

1817.

BELENAP
v.
BELENAP.

[* 466]

1817.

BELKNAP
v.
BELKNAP.

the defendants may be enjoined from assessing and ditching, &c., in regard to the outlet, &c., and for general relief.

[* 467]

The answer of the defendants admitted the titles of the plaintiffs, except as to the pond, and that the mills at the outlet depended for water on the *great pond*; but they say that those mills are of little value. They admitted also the title of *C. B. as trustee, &c.*, but say, that the *lower mills* are not much benefited by the pond, and would be more so, if the dam was lowered, as proposed; and they alleged that there were no mills at the outlet, until within *30 years; and they admitted the proceedings as to draining the bog meadow, &c., as stated in the bill, and allege that those proceedings were regular and pursuant to the act; and that the inspectors did not exceed their powers: they denied that cutting the outlet, as proposed, would drain the pond; but they admitted that it would injure the mills there, but not to the amount of 4,000 dollars, &c.

S. Jones, jun., and Boyd, for the plaintiffs.

Harison, and Riggs, for the defendants.

The counsel for the plaintiffs insisted on the following points: 1. That the proceedings of the defendants were not authorized by the act.

2. That the inspectors exceeded their powers, and their proceedings were irregular and void.

3. That the draining of the bog meadow, in the manner proposed, would greatly injure the lower mills of the plaintiffs, for which damage no compensation was provided.

4. That the operation ought not to be permitted, until adequate compensation was provided.

5. That the defendants ought to be restrained, by injunction, from proceeding, and the plaintiffs be quieted in their rights.

They cited 1 *Ch. Cas.* 504. 1 *Bro. Ch. Cas.* 588. 2 *Vernon*, 390. 1 *Madd. Ch.* 129.

For the defendants, the following points were raised:

1. That the draining, &c. according to the plan proposed by the inspectors, will not injure the mills of the plaintiffs, situated farthest from the pond; and that if the mills, near the pond should be destroyed by the proposed operation of draining, they were of no public importance, and the private injury would be compensated by the funds to be raised from the property benefited.

[* 468]

*2. That the legislature had vested in the Court of Common Pleas, and in the inspectors appointed by that Court, 360

exclusively, the right of determining whether the contemplated works ought to be done, subject only to the superintending power of the Supreme Court to correct errors; and that a Court of equity has no jurisdiction in the case, there being neither fraud nor accident to give it jurisdiction.

3. That this Court has no authority beyond that of a Court of law, in construing and expounding an act of the legislature; and that, with respect to acts like the one for draining the swamps in question, the particular jurisdiction thereby erected acts *conclusively*, while it acts within the bounds prescribed.

They cited 5 *Vesey*, 610. 7 *Vesey*, 3. 10 *Vesey*, 209. 2 *Vernon*, 711. 1 *Ch. Cas.* 227. 3 *Ch. Rep.* 226. 2 *Atk.* 144. 2 *Dow's Rep.* 519. 534.

THE CHANCELLOR. The bill is filed to quiet the plaintiffs in the possession and enjoyment of their mills and other improvements, on the *Passaic* creek or outlet of the *great pond*, near *Newburgh*, and to stop the defendants from lowering the outlet. The proceedings complained of were instituted by the defendants, under the act of the 9th of *April*, 1804, relative to the *draining of swamps and bog meadows in the counties of Orange and Dutchess*; and the principal question in the case is, whether the act gives authority to interfere with the property of the plaintiffs, in the manner proposed.

The design of the act was to enable any one or more of the proprietors of swamps and bog meadows to have them drained, at the joint expense of all the proprietors. Most of the provisions in the act apply, therefore, exclusively to the interest of those proprietors, and do not touch the plaintiffs. When application is made to the Court of Common Pleas to have inspectors appointed to determine on the expediency, the plan, and the expense of draining, and to *make a ratable assessment of the expense, the notice enjoined by the act is to be directed to the parties interested in the lands to be drained. The notice is to "all persons interested therein," that, is, in the swamp or bog meadow. No other persons are called on to take notice of the proceeding, or to have any concern in the appointment. And when the inspectors have made their return, the proprietors may meet and choose commissioners to act in the place and stead of the inspectors, and who are then to be clothed with their powers. There is but one section under which third persons, who are not interested in the lands to be drained, can be affected by these private and *ex parte* proceedings, and here they are affected only in what appears to have been considered as a mere incidental circumstance. The 6th section provides, that in case the inspectors shall find it

1817.

BELKNAP
V.
BELKNAP.

June 9th.

[* 469]

1817.

BELEKNAP
v.
BELEKNAP.

necessary "to continue such ditch or ditches through lands adjoining any such tracts of swamp or bog meadow, for the purposes of draining the same more effectually, they are authorized to agree and settle with the owner or owners of such lands, for such damage as is likely, in their opinion, to be sustained by such owner or owners, by reason of such ditch, &c.; and if they cannot agree, the inspectors are to apply to the Court to appoint appraisers." It is under this section that the present controversy has arisen.

[* 470]

The inspectors have reported a plan for draining the swamps north and south of the great pond, and have, in their map, laid down the course of a main ditch through each swamp, and terminating at the pond. This pond, which is designated on the map as the *great pond*, is a mile and a half long, and one mile broad, and on an average, 13 feet deep, and covers 400 acres of land. The ditches terminating at the pond will not, it seems, answer the purpose of draining the swamps, on account of the elevation of the water; and the inspectors accordingly propose to lower the pond very materially, by cutting down the outlet of it, *by a ditch 10 feet deep, and 16 feet wide. The plaintiffs allege, and have gone largely into proof to show, that this project of lowering the pond would destroy the value of the pond and outlet, as a source of water for the use of mills below. The defendants admit that the mill and dam at the outlet would be essentially affected; but they insist, and have gone into proof to show, that the mills of the plaintiffs lower down on the outlet would not be injured. The witnesses differ essentially, in their opinion and judgment on this point. But the question of damage is not the one I am now considering. It is sufficient, for the discussion of the matter of right, that the mill and dam at the outlet must be injured, and that the lowering of the pond to the extent proposed, is an experiment deemed by many very hazardous, in respect to the future value of the outlet to all the mills that are seated upon it. The important question is, Have the defendants authority, under the 6th section of the act, to cut down this outlet? Can this properly be deemed a *continuation* of the main ditch through lands *adjoining* the swamp? The inspectors, in their report, so consider it; for they say, "we find it necessary to continue the first-mentioned main ditch through lands adjoining said tract of swamp or bog, for the purpose of draining the same more effectually, viz. through what is called the outlet of the great pond;" and yet it appears that this outlet is at the distance of one mile from the termination of the main ditch above alluded to.

From the best consideration that I have been able to be-

stow on the subject, it appears to me that the inspectors have given too extended a construction to their powers under the act.

To continue a line or ditch, does not, in the ordinary or grammatical sense, admit of any intervening substance to break the continuity. It implies uninterrupted connection; and the ditch cannot properly be said to be *continued*, by terminating it at the north end of the pond, and *by deepening the outlet of that pond at the southeast corner. We cannot suppose it without indulging in the same poetical fiction by which the river *Alpheus* was continued from *Greece* to *Sicily*: *occultas egisse vias subter mare*. The ditch was to be continued through lands *adjoining*, that is, through lands next to, and which touched, the swamp or bog meadow; but none of the lands of the plaintiffs adjoin the great swamp where the main ditch terminates, though they may adjoin the small or pine swamp at the south end of the pond.

If the operation of cutting down the outlet is not within the letter of the permission under the act, we are certainly not warranted, in this case, to construe the power liberally, and to extend it by equity. It is not a case that concerns the public, but one of mere private convenience and profit. The preservation of the great pond and its outlet, may be as useful to the plaintiffs as the draining of the swamps would be to the defendants, and the interest of each party has an equal claim on the protection of the government; one interest ought not to be made subservient to the other. This permission to continue the ditch through adjoining lands, without the consent of the owner, ought to be strictly construed, and not carried beyond the plain letter of the act. It is an invasion of the rights of property; and it is evident that the act could only have had in view cases of the most immaterial and trifling consequence, or the power would never have been granted with so little check. We have seen that the plaintiffs could not have had any legal notice of the application to the Common Pleas, nor any agency in the appointment of the inspectors, and that the decision of the inspectors, as to the necessity and course of the ditch, is, at once, conclusive upon them. We are, therefore, required, by justice and policy, and the soundest rules of interpretation, to confine the inspectors and their operations, as they may affect strangers who have no interest in the swamps, within the strict precise limits prescribed *by the statute. How cautiously and guardedly are powers given, even to public officers, to lay out highways for the use of the public, over private property. They are not to be laid out over cultivated grounds, without the certificate of twelve freeholders, that the road is necessary, nor through any or

1817.

BELKNAP
v.
BELKNAP.

[* 471]

[* 472]

1817.

BELKNAP
v.
BELKNAP.

chard or garden of four years' growth, without the owner's consent. Can we suppose that this act intended that these inspectors should carry their ditches where they pleased, without any regard to the improvements of others? I am entirely persuaded, that the project of draining this little lake, and thereby destroying one mill, and affecting, more or less, all the others which are supplied by its waters, is a stretch of power never within the contemplation of the act. It would be an unreasonable and dangerous construction. The power given was supposed to be harmless. It was never intended to touch and materially injure valuable improvements on adjoining lands; much less was it intended to break up useful ancient streams, and the natural and capacious reservoirs which fed them. It is most fit, therefore, that this power should be kept within the words of the act.

If I am right in the construction of the act, then the jurisdiction of the Court, and the duty of exercising it, are equally manifest. The title of the plaintiffs to the use of the outlet is undisputed, and they, and those under whom they hold, have been in the enjoyment of that right for a great number of years.

In *Finch v. Resbridget*, (2 *Vern.* 390.) a bill was filed to quiet the plaintiff in the enjoyment of a water-course running to his house and garden, through the ground of the defendant, and the right and long enjoyment of the plaintiff appearing, the lord keeper gave effect to the bill. Again, in *Bush v. Western*, (*Prec. in Ch.* 530.) the plaintiff had been in possession of a water-course for 60 years, and *the defendant interrupted it, by making a cut or channel through his own lands, and a perpetual injunction was awarded; and it was agreed, in that case, to be usual to have such bills in this Court, in the first instance.

[* 473]

These cases relate to acts of interruption by private individuals; but there are other cases still more applicable, because they relate to the proceedings of persons acting under a statute.

Thus, in the case of *Hush v. The Trustees of Morden College*, (1 *Vesey*, 188.) Lord *Hardwicke* allowed an injunction to restrain turnpike commissioners from entering on the land of the plaintiff to dig gravel, as it was not a case within their authority. The lord chancellor said he should not interpose in a doubtful case, until that doubt was removed, and the matter determined at law; but there the case was plain, and if the commissioners went beyond their jurisdiction, they were as much trespassers as private persons; and though they might be responsible at law, that would be only for a particular wrong, and the remedy would not be equal to the remedy in this Court. In the late case

of *Shand v. The Aberdeen Canal Company*, (2 Dow. 519.) which was a *Scotch* case, determined, on appeal, in the house of lords, Lord *Eldon* said, that if the canal commissioners exceeded their powers, they became trespassers, but chancery would restrain them by injunction, and keep them strictly within the limits of their power. The case of *Agar v. The Regent's Canal Company*, (*Cooper's Eq. Reports*, 77.) is still more recent, being as late as 1815, and it shows that the jurisdiction of chancery on this subject is well settled, and in constant exercise, and that the cases maintain the most steady uniformity in their doctrine and belief. The bill, in that case, was filed by the plaintiff, as owner of an estate through which the defendants proposed to make a canal, under a private act of parliament. The prayer of the bill was to *restrain the defendants from carrying the canal through his garden and brick-yard, and the injunction was allowed so far as to restrain the defendants from deviating, in cutting their canal, from the line prescribed. The lord chancellor admitted that the plaintiff might have lain by and rested on his legal rights, and then brought trespass, but he was, also, at liberty to come into chancery, in the first instance, for a preventive remedy; and if there was any dispute as to the fact, which course the defendant ought to pursue, he would direct an issue.

These cases remove all doubt on the point of jurisdiction, and the observation of Lord *Hardwicke* alludes to its pre-eminent utility. This is not a case of an ordinary trespass impending, but one great and special, leading to lasting mischief, and the destruction of the estate, and tending to multiplicity of suits. There is no fact in this case to be ascertained. The whole case turns upon the construction of the act, and, considering it in the light that I do, the prayer of the bill ought to be granted.

Let the injunction, therefore, against any proceedings on the part of the defendants, touching the outlet in the bill mentioned, be made perpetual.

Injunction continued.

N. B. The question of *costs* being afterwards agitated, the Court decided, that neither party should have costs, as against the other.

1817.

BELKNAP
V.
BELKNAP.

[* 474]

1817.

PERINE
v.
SWAIM.

*CATHARINE PERINE *against* SWAIM and others.

A plaintiff will not be allowed to dismiss his bill, without costs, unless it appears that he had reasonable grounds for filing it.

Proofs taken in a *cross* suit will not be allowed to be read on the hearing in the *original* cause, unless the *parties*, by themselves, or by their privies, by representation, are the same in both causes.

June 15th.

PETITION stating that the petitioner's late husband, *Joseph Perine*, and herself, on the 24th of *December*, 1813, filed their bill against *Simon Swaim*, and *Dorothy* his wife. and *John Dunn*, stating, that the defendant *S. S.* the father of the plaintiff, by deed dated 14th of *November*, 1794, conveyed to her, in fee, 90 acres of land in *Richmond* county, and also 9 acres of salt meadow; that she and her husband permitted him to continue in possession; that after the execution of the deed, the defendant *S. S.* married with the defendant *D. S.* That *S. S.* and his wife mismanaged the farm, and committed *waste*; that in 1812, the plaintiffs put their son in possession of part of the farm, and left *S. S.* and wife in possession of the residue. That *Joseph Perine* brought an action of *ejectment* against *S. S.* and the above bill was then filed, the prayer and object of which was, to *stay waste*, and an injunction was granted accordingly. That the *ejectment* suit was never tried, but abated by the death of *S. S.* That *S. S.* and wife, and *Dunn*, all answered the bill; that the plaintiff, *Joseph Perine*, then died; that, by the answer of the above defendants, they alleged the deed to have been procured by fraud, and to prevent the dower of *Dorothy S.*, and that the deed was never delivered till 1807, when *Joseph Perine* got permission to look at it, and fraudulently kept it. That the plaintiff is sole heir of *S. S.* The answer denied *waste*, and any tenancy; but that a few loads of necessary fire-wood were cut, which was all the *waste*; that the plaintiff examined no witnesses; that *S. S.* died intestate, and left the plaintiff his sole heir; that in *March*, 1814, *S. S.* exhibited his bill against *Joseph *Perine* and wife, and their son, *S. S. Perine*, in the nature of a *cross bill*, to enjoin the said action of *ejectment*, and to have the deed cancelled, on the ground of fraud; that *Joseph Perine* died, before answer, viz. on the 16th of *April*, 1814; that the other two defendants answered, and proof was taken on both sides, and publication passed; that *S. S.* died the 16th of *April*, 1816, leaving the plaintiff sole heir, &c. That this last suit being abated, and all the interest vested in the pe-

[* 476]

tioner, it cannot be revived. No proof was taken on the part of the petitioner in the first bill, because the bill was only for an injunction; but proof was taken in the second bill brought by S. S., and which abated as aforesaid. The petitioner prayed for leave to dismiss the first bill, *without costs*, as there was no use in proceeding, or if not, that the proofs taken in the *cross suit* might be used at the hearing of the first cause.

1817.

PERINE
v.
SWAIN.

Riggs, in support of the petition, cited 2 *Vernon*, 447. 2 *Vesey*, 679.

Baldwin, and *Wallis*, contra. They read the affidavit of *John Dunn*, showing the fraud in procuring the deed, and the oppressions of *Joseph Perine* towards S. S., and that the object was to deprive *Dorothy S.* of her dower; that by the injunction, reasonable *estovers* were allowed to S. S.; that in the *cross bill* *Joseph Perine* died, before the benefit of his answer could be procured, and S. S. was unable to procure the testimony of *Wm. Sharp*, the subscribing witness, because the witness lived at a distance of 400 miles, and he was too poor to procure his testimony. They read, also, the testimony of *Wm. Sharp*, taken before arbitrators, on the 25th of *October*, 1816, in which he stated that he was a witness, at the request of S. S., who told him, 22 years ago, that he was going to be married that night to *Dorothy S.*, then the widow of *Garrison*, and was going to make a deed of gift to his daughter, previously *to his marriage. But S. S. said he meant to keep the deed during his life, and that the deed was kept secret ever since.

[* 477]

THE CHANCELLOR. It would be improper to allow the petitioner, *Catharine Perine*, to dismiss her bill without costs, unless I am satisfied that she had some reasonable grounds for the filing of the bill. She and her husband filed this bill in 1813, and principally for the purpose of preventing waste; but the bill prayed relief, and the defendants were called on to answer, and they did answer, and denied all equity in the bill, and set up matter which, if true, showed the claim of the plaintiffs to be groundless and unjust. Issue was joined in the cause, and proof taken on the part of the defendants, but not on the part of the plaintiffs. Surely a plaintiff, under these circumstances, can never withdraw his suit without costs. It is sufficient merely to state the fact, to be convinced of the unreasonableness of the application. The defendants have been put to unnecessary trouble and expense in the defence of a suit most unjustly commenced, if we are

1817.

PERINE
v.
SWAIN.

to credit their allegations, and I have no right to discredit them until the proofs and the merits have been discussed.

The first part of the motion, praying for leave to dismiss the bill without costs, is, therefore, denied.

The other branch of the motion is for leave to use, on the hearing of the cause, the proofs taken in the *cross* bill, filed by *Simon Swaim* against the present plaintiff and her husband. It is true, that the same question of fact was the essential ground of each suit, viz. the question on the validity of a deed executed by *Swaim*, in 1794; but the parties were not the same. The present defendants are *Dorothy Swaim* and *John Dunn*, and they were no parties to the cross bill; and though the question may be the same, yet I apprehend the rule requires that *the parties*, by themselves, or by their privies, by representation, should also be the same, before the depositions taken in one cause can be used in another. The rule is so laid down in *Wyatt's P. R.* (p. 173.) and in the case cited from 2 *Vern.* 447. The party against whom the deposition was to be used was the same in both causes.

[* 478]

In *Chapmans v. Chapmans*, (1 *Munf.* 398.) a record of one suit was held not to be admissible, as evidence in another chancery suit, on the ground that the defendant, and one of the plaintiffs in the latter suit, were parties to the former, but that another plaintiff, and the person under whom both the plaintiffs jointly claimed, were not parties to the former suit. *Catharine Perine* is here the party in both causes, and she wants to use, in her favor, depositions taken in another cause, in which she was a party, and the defendants were not. This would be against the most plain and ordinary notions of justice. It would be subjecting a party to the pressure of proof, which he had no opportunity to cross-examine or controvert. A fact stated in the affidavit of the defendant *Dunn*, shows how unjustly this would operate in the present case. *Simon Swaim*, the only party in the cross cause, against the present plaintiffs, was old and poor, and unable to procure the testimony of *William Sharp*, who resided at 400 miles distance, and whose testimony was most material to the very gist of the controversy. The proof in that cause was thus very imperfect on the part of *Simon Swaim*, and these defendants ought not to suffer, or be put to any inconvenience from the want of knowledge or ability in *S. Swaim*, to procure full and accurate testimony. They had no concern in his cause, and are not responsible for his acts.

The motion, on both points, is, accordingly, denied, and the question of the costs of this motion reserved, until the

consideration of the final disposition of the costs of this suit.

1817.

Motion denied.

LIVINGSTON
V.
DEAN.

N. B. After the judgment was delivered, the plaintiff immediately moved to dismiss her bill, on payment of costs, which was granted.

*LIVINGSTON *against* DEAN and others.

[* 479]

The assignee of a bond and mortgage takes it, subject to all the equity of the *mortgagor*; but not to the *latent* equity of a *third* person. To subject him to such an equity, he must have express or constructive notice of it, at the time of the assignment.

THE plaintiff, on the first of *May*, 1808, sold to *Daniel S. Dean*, defendant, about 2,000 acres of land, in *Dutchess* county, and took his bond and mortgage to secure the purchase money. The mortgage was not registered until the 16th of *August*, 1808. In the interval, between the date and registry of the mortgage, *Dean* sold different parcels of the land, and took bonds and mortgages to himself, all of which mortgages, except one, were duly registered prior to the 16th of *August*, 1808. *Dean*, instead of assigning these bonds and mortgages to the plaintiff, towards payment of the purchase money, assigned them to the other defendants; and the present suit was brought against *Dean* and the assignees, claiming the amount of the bonds and mortgages so assigned.

June 13th.

The answer of *G. P. Oakley*, one of the defendants, stated, that *Dean*, being indebted to him and his partner, in the sum of 61,110 dollars and 45 cents, was applied to for security, and *Dean* offered to assign to him the mortgages he had so taken for the parcels of the land he had sold; and, on being questioned by the defendant *Oakley*, *Dean* said he had not executed any mortgage to the plaintiff, to secure the purchase money, and that he was not to give a mortgage until after the expiration of six months; during which time he had the right to dispose of such parts of the land as he thought proper; and at the expiration of the six months, he was to make the plaintiff considerable payments in cash, or

1817.

LIVINGSTON
V.
DEAN.

in such securities as he should take from *the respective persons to whom he should sell and convey parts of the land purchased of the plaintiff, or in both; and was then to mortgage to the plaintiff the residue of the tract unsold, as a security for the balance of the purchase money. That at the time of the assignment of the mortgages, or soon afterwards, *Dean* told *Oakley*, that he intended to redeem the mortgages, for the purpose of assigning them to the plaintiff, in part payment for the land.

The suit having abated by the death of the plaintiff, was revived, in favor of his representatives, and was brought on to a hearing this day, on the master's report.

June 13th.

Riggs, for the plaintiff.

D. B. Ogden, for the defendant *Oakley*.

THE CHANCELLOR. From the admissions in the answer of *G. P. Oakley*, there is no doubt of his being bound in equity to account to the plaintiff for the bonds and mortgages so assigned to him by *Dean*. Though the assignee of a bond and mortgage takes it subject to all the equity of the mortgagor, yet as to the latent equity of a third person against the mortgagee, as possessor of the mortgage, the case is a little different. The assignee does not take the mortgage subject to such an equity, unless he has notice of it, expressly or constructively; and in this case, the notice is sufficiently admitted by the answer; and the defendant *Oakley* must be held to account for the amount of these bonds and mortgages, equally as *Dean*, from whom he received them, and who took and held them in trust for the original plaintiff. This principle of equity was lately declared, and applied in the case of *Murray* and *Winter* v.

† *Ante*, p. 441 *Lylburn* and others.†

Decree accordingly.

1817.

CONSEQUA
V.
FANNING.

*CONSEQUA *against* FANNING and others.

Notice of a motion to prove *exhibits*, at the hearing, must be served *four* days before the hearing.

Papers or writings, of every description, may be proved at the hearing, and the witnesses may be cross-examined at the discretion and under the direction of the Court. But no paper can be proved as an *exhibit*, at the hearing, unless satisfactory reasons be shown to the Court, why it was not regularly proved, in the usual way, before the *examiner*.

AN order was obtained and served on the plaintiff's solicitor, for liberty to prove, at the hearing, certain exhibits therein specified, viz. certain *letters* written by the plaintiff to the defendants, and also an *agreement* between the plaintiff and one of the defendants, and also certain *proceedings* in the Circuit Court of the United States, for the district of New-York, and a certain *order* by the plaintiff on the defendants.

June 14th.

Riggs, for the plaintiff, objected to the proving of those exhibits:

1. Because the order had not been served upon him four days before the hearing.

2. Because most of those documents were not under seal; and he contended, that the rule allowing of such proof was confined to deeds and records which could not be gainsayed, and admitted of no cross-examination. He cited *Wyatt's P. R.* 186. and *Bohun's Cur. Cancell.* 306. 2 *Vesey*, 472.

T. A. Emmet, contra, cited 1 *Harr. Prac.* 403, 404. 594. 2 *Madd. Ch.* 325, 326.

THE CHANCELLOR. The objection to the want of four *days' notice of the order is well taken, and, unless waived, is fatal.

(The counsel thereupon waived it.)

The old rules and practice of the Court confined the proof of papers, by examination of witnesses, *viva voce*, at the hearing, to deeds and copies of records. In *Pomfret v. Windsor*, (2 *Vesey*, 479.) Lord *Hardwicke* would not allow a receipt to be proved at the hearing, because it was an established rule, that such proof must be confined to the handwriting, and that you could not enter into an examination that would admit of a cross-examination. For the same reason it was held, in *Eade v. Lingood*, (1 *Atk.* 203.) that

[* 482]

1817.

CONSEQUA
V.
FANNING.

a will could not be proved by a *viva voce* examination, at the hearing, for the defendant has a right to a cross-examination, and there is more to be proved than the mere execution of the instrument; and the sanity of the testator may be made a question. The same rule had been previously declared by Sir *Joseyh Jekyll*, (*Harris v. Incledon*, 3 P. Wms. 93.) and so extremely strict was the ancient practice of the Court, in respect to these *viva voce* examinations, that in *Bloxton v. Drevit*, (*Prec. in Ch.* 64.) a deed could not be proved, at the hearing, where the witnesses were dead, by proving their hands, and the master of the rolls put off the hearing, to enable the party to prove the deed in the regular way.

There was an attempt made, in *Graves v. Budget*, (1 Atk. 441.) to relax the severity of this practice, by a motion for leave that witnesses might prove exhibits at the hearing, and that the defendant might cross-examine them. But the lord chancellor refused the indulgence, and held, that it would be contrary to the course of the Court, which was the law of the Court. Its principle was to proceed upon written evidence. Witnesses are examined *viva voce* very sparingly. They are never examined at large at the hearing. They are only let in to prove exhibits when the application is by the party who is to use them.

[* 483]

*On such strong authority the ancient practice of the Court rested, and yet the modern books prove clearly a relaxation of the former rule. They extend the proof by witnesses, at the hearing, to all kinds of writings, as letters, accounts, &c. (1 *Harrison's Prac.* 594, 595. 2 *Maddock's Ch.* 325.) The Court is more liberal than formerly. Mr. *Dickens*, the register, (*Dickens's Rep.* 642.) says, these *viva voce* examinations of witnesses at the hearing, was a constant practice, and, to his knowledge, it had been the practice, almost every day, for fifty years. Lord *Eldon*, in the late case of *Turner v. Burleigh*, (17 *Vesey*, 354.) went further, and completely overturned the rule to which Lord *Hardwicke* so pertinaciously adhered: he said, that there might be a cross-examination, on proof, *viva voce*, of an exhibit, and that the Court would examine on the suggestion of any question. This was establishing a most reasonable course, for it is unjust to allow of any examination on one side, and not to permit a question to be put on the other.

These examinations, at the hearing, ought, undoubtedly, to be very sparingly used, or they would tend very much to delay and embarrass business, by changing the whole practice of the Court, and giving it a *nisi prius* character. In my opinion, no paper whatever ought to be proved at the

hearing, without satisfactory reasons being assigned why it was not proved in the regular way, before the examiner; when the exhibit is to be proved in Court, the rule ought to apply equally to writings of every description, and a cross-examination be permitted under the direction and at the discretion of the Court. These are the principles by which such practice is to be governed in future, and the proof in question is, consequently, to be admitted.

With respect to the mode of bringing on such applications, the books of practice speak of a previous order to be obtained, on motion or petition. But it was hinted in *1 *Johns. Ch. Rep.* 560. that notice might be a substitute for the order. That appears to me to be the more convenient practice; and, therefore, I shall, hereafter, require only notice to be duly given to the opposite party of an intention to make such proof at the hearing; and the deed, writing, letter, &c. to be proved, must be sufficiently described in the notice; and when the motion is made, I will then determine on the sufficiency, not only of the notice, but of the reason for the departure from the regular course.

N. B. The objection to the regularity of the notice being waived, the papers were, accordingly, proved by witnesses produced in Court.

1817.

CONSEQUA
V.
FANNING.

[* 484]

1817.

HENDRICKS
v.
ROBINSON.

HENDRICKS *against* ROBINSON and FRANKLINS.

After a final decree, an order for the defendant to account before the master, so as to vary the relief sought by the bill, will not be granted on motion; but the reference must be granted, if at all, after a rehearing in the cause.

June 16th.

BRINCKERHOFF, and *Hoffman*, for the plaintiff, moved for an order, founded on the pleadings, proofs and decree in this cause, that the defendant *Henry Franklin* account before a master for the rents and profits of the real estate, mentioned in the pleadings to have been conveyed by the defendants *A. & J. Franklin*, to *Henry Franklin*; and that he state, on oath, to the master, the parts of the real estate conveyed by him, and to whom, and the time when, and the consideration for each parcel; and that he also state, on oath, the personal estate received by him from the above defendants, or from any other person, on their account; and that he account for the same; and that the *master report whether the said *Henry Franklin* had possessed himself, by assignment or otherwise, of the several judgments of *J. Moratt* of *J. & N. Heard*, and of *W. Müller* and others, against *Franklin, Robinson & Co.*, and whether he so possessed himself of the said judgments, as the agent of, and with the funds of *Robinson, Franklin & Co.*

[* 485]

In support of this motion, they cited 4 *Johns. Rep.* 601. 546—8. 2 *Harr. Prac.* 108. 7 *Vesey*, 292. 13 *Vesey*, 393.

Harison, T. A. Emmet, and *Riggs*, contra, opposed the motion, on the ground that this would be a material alteration of the relief granted by the decree in this cause, which went no further, in respect to *Henry Franklin*, than to declare that the conveyances from *Abraham* and *John Franklin* to him, executed in *February* and *March*, 1808, were fraudulent and void. That if the decree was defective in this respect, it could not be corrected on motion, but there must be a rehearing; and even if the cause was now reheard the bill itself did not entitle the plaintiff to this relief, for he had not established any title to the real estate of *Abraham* and *John Franklin*, being only a judgment creditor, and the rent and profits belonged rather to their assignees.†

† *Ante*, p. 283.
S. C.

THE CHANCELLOR. The relief sought cannot be obtained upon this motion. There must, at least, be a rehearing.
374

The application goes to change, essentially, the nature and extent of relief; and the reference called for cannot be considered as a mere omission in the decree, to be supplied as of course. It is questionable whether the reference could be granted under the circumstances of this case, even upon a rehearing; but, without giving any opinion on that point, this motion must be denied.

Motion denied.

1817.

 BRINCKER-
 HOFF
 V.
 THALLHIMER.

*BRINCKERHOFF *against* THALLHIMER.

[* 486]

Where the *interest* on a mortgage is payable *annually*, and the principal at a future period, on a bill for a foreclosure and sale, for non-payment of *interest*, the whole, or a part of the premises, will be sold, as the Court may deem just and necessary, on a special report of the master, as to the situation of the premises, and as to the best mode of sale; and an order, from time to time, as the *interest* or principal becomes due, for a future sale, may be obtained, on the foot of the decree, on obtaining the master's report as to the amount due, &c.

BILL to foreclose a mortgage executed by the defendant to the plaintiff, on the 24th of *March*, 1813, on a lot or parcel of land at *Clifton Park*, in the town of *Halfmoon* and county of *Saratoga*, containing about 180 acres, to secure the payment of 3,000 dollars, in seven years from the 1st of *April*, 1813, with interest, *annually*. The master reported 752 dollars and 16 cents due for *interest*. The bill was taken *pro confesso*. A decree was accordingly made, in the usual form, for the sale of the mortgaged premises, or so much thereof as should be necessary to raise the interest due, and costs, and which could be sold separately without material injury to the parties, or either of them.

June 17th.

Riggs, for the plaintiff.

THE CHANCELLOR, to ascertain whether the ends of justice, and the interest of the parties, required a sale of the whole, or only of a part of the premises, *Ordered*, that in case the master, employed to make the sale, should have doubts on that point, he should, then, before he proceeded to a sale, cause a map of the whole premises to be made, and report the same with the facts and reasons on which his doubts

1817.

LYMAN
v.
SALE.

arose, respecting the propriety of selling the *whole or only a part of the premises, to the end that directions might thereupon be given. And, with respect to the interest and principal to grow due; and payable thereafter, the following order was entered:

"And, inasmuch as it appears by the bill, and the said master's report, that the said mortgage is to secure the principal sum of 3,000 dollars, which is not yet payable, and the interest thereof, which is payable, annually, on every first day of *April*, and that, therefore, interest will become payable to the plaintiffs hereafter, as well as the said principal sum which ought to be raised out of the said mortgaged premises, by future sales thereof, in case the whole of the said premises shall not be sold under the foregoing order of sale: it is, therefore, further *ordered*, that the plaintiffs shall be at liberty hereafter, and from time to time, as the said annual interest shall become payable, or when the said principal sum shall become due, to go before a master upon the foot of this decree, and obtain a report as to the sum then due and payable, to the end that such report being made to this Court, an order may thereupon be made, for a further sale of the residue of the mortgaged premises, or parts thereof, to satisfy what shall so be reported due, with the costs attending such report and sale." (a)

(a) Vide *Marshall v. Thompson*, (2 *Manford's Rep.* 412.) where a similar order was granted in chancery, in respect to the future arrears of an annuity.

LYMAN *against* SALE and others.

June 17th.

[* 488]

A LIKE decree was made in this case, in which the mortgage was to secure the payment of four several bonds, some of which were not yet due; but as the payment of the **second* bond would become due before the period of *six weeks*, for advertising under the decree, would elapse, the payment of that bond was included in the order of sale.

1817.

WISER
V.
BLACHLY.

WISER, an infant, by her next friends, *against* BLACHLY and others, executors of VAIL.

A petition for a *rehearing* ought to state the grounds on which the rehearing is asked, to enable the Court to exercise its judgment as to the propriety of granting the motion.

A *bill of review* is proper after a decree is enrolled, and a *supplemental bill*, in nature of a bill of review, *before* the enrolment of the decree.

Instead of enrolments on parchment, as formerly used, the bill, answer, pleadings, and orders, &c. in a cause, are annexed and filed, with a fair engrossed copy of the final decree, in the *register's* office, after expiration of 30 days from the time final decree is pronounced. (Act, 1 N. R. L. 488.)

The party who asks for a bill of *review* must show that he has performed the decree, especially as regards the payment of money, and that he has paid the costs.

A *bill of review* must be, either for error in point of law apparent on the face of the decree, or for some new matter of fact, relevant to the case, discovered since publication passed, and which could not, with reasonable diligence, have been discovered before.

PETITION by the three *executors* of *Vail*, defendants, stating that they had been informed, within a few days, that, in 1808, or 1809, a suit was brought, in the Supreme Court, by *Thomas Brush*, and *Deborah* his wife, against *Moses Blachly*, (defendant,) to recover moneys received to the use of *D. Brush*, as administratrix of *George Wiser*, deceased. That the subject matter of that suit was referred to three arbitrators, two of whom, on the 8th of *July*, 1808, awarded that *Blachly* should pay to *Brush* and his wife, 536 dollars and 22 cents. That the arbitrators included in their award the amount received by *B.* on a note of *T. A. Woodhull*, for 200 dollars, dated the 9th of *March*, *1805, and the amount received by *Blachly*, on a note of *E. Chadwick* and *F. Averill*, for 395 dollars, dated the 29th of *November*, 1805. That the petitioners had no knowledge of the arbitration, until a few days ago. That on the original hearing of this cause,† it was decreed that a bond, executed by *Blachly*, guardian of *Wiser* the plaintiff, and *P. Vail, jun.* as his surety, to the *People* was binding; and that *Blachly* should be charged with the amount received by him on the notes above mentioned, with liberty to him to show that the amount of the note of 395 dollars was not received by him, and could not, with all diligence, be collected. That in taking the account, under the decree, between the plaintiff and *Blachly*, the latter has been charged with 187 dollars 37 cents, as received from *Woodhull*, with interest, and with 300

June 18th.

[* 489]

† Vol. 1. p. 607.
S. C.

1817.

WISER
v.
BLACHLY.

dollars, as for principal and interest on the other note. That exceptions were taken to the report, which were overruled, and a final decree entered, as by default. That the articles received by *Blachly* for the second note, for 395 dollars, were sold by him for 100 dollars, being all the money he received. The petitioners stated, that they did not know nor believe that *Vail*, their testator, ever received any indemnity for being surety for *Blachly*. They prayed for leave to file a *bill of review*, or a *supplementary bill*, in the nature of one; and that the exceptions to the master's report, and the cause, may be *re-heard*, and that all proceedings, in the mean time, be stayed.

The petition was sworn to, and a certificate of two counsellors annexed, that they thought the prayer of the bill ought to be granted.

Baldwin, in support of the petition, cited 1 *Harr. Ch. Pr.* 137. 144, 145.

[* 490] *Riggs*, contra, cited *Ambler*, 293. *Cooper's Eq. Pl.* 91. 4 *Vin. Ab.* 409. *Cooper's Eq. Pl.* 20. 1 *Vern.* 117. *2 *Bro. P. C.* 63. 65. note. 1 *Vern.* 264. 3 *Pere Wms.* 371.

THE CHANCELLOR. There are several objections to this application. It is bad in form, and in substance.

It is an application for a re-hearing on one point, and for a bill of review on other points.

Petition for a
re-hearing.

In *January* last, a decree was pronounced in this cause, and it appears from that decree, that exceptions had been taken to the master's report respecting the account between the parties, and that those exceptions had been set down for hearing, on due notice, and that no person appeared on the part of the defendant to support them, and they were overruled. There is no reason assigned, why the solicitor or counsel for the defendants was unable to attend, or why other counsel were not employed. There is no excuse offered for the default, nor any ground to induce a presumption, that the exceptions, or any of them, were well taken. To interfere on such pretexts, with a decree, after such a lapse of time, would be unreasonable. Lord *Redesdale* said, (*Sch. & Lef.* 398.) that the petition for a re-hearing ought to state the grounds on which the cause is sought to be re-heard: this seems necessary, to enable the Court to exercise a sound discretion in declaring its judgment upon the motion.

Bill of review,
when brought.
Supplemental
bill, in nature
of a bill of re-
view, when
brought.

The petitioners next ask for leave to file a bill of review, or a supplemental bill, in the nature of one. The bill of review is proper after a final decree enrolled, and the supple-

mental bill in the nature of one, before it is enrolled. (2 *Madd. Ch.* 409.) The enrolment prescribed by our statute, or, rather, the substitute for it, is to be done by the register, after the expiration of thirty days from the time the final decree is pronounced. But I do not suppose it material in this case, whether the application be for a bill of review, or a supplemental bill in the nature of one, for *in either case, the same leave, and the same grounds for the application, are requisite.

1817.

WISER
v.
BLACHLY.

[* 491]

In the first place, the party asking for a bill of review, must generally show that he has performed the decree; especially, if it be (as in this case) a decree for the payment of money; and he must likewise pay the costs, and nothing will excuse the party from this duty, but evidence of his inability to perform it. (*Williams v. Millish*, 1 *Vern.* 117. *Fitton v. Macclesfield*, 1 *Vern.* 264. *Cooper's Eq. Pl.* 90. *Note to Bishop of Durham v. Liddel*, 2 *Bro. P. C.* 24.) This appears to be a settled rule, laid down both in the ancient and the modern books; but the petitioners have paid no attention to this rule, for there is no offer to perform any part of the decree, or even to bring the money into Court, or any pretext of poverty, want of assets, or other inability to do it. There is wisdom in the establishment of such a provision, and it ought to be duly enforced. Its object is to prevent abuse in the administration of justice, by filing bills of review for delay and vexation, or otherwise protracting the litigation, to the discouragement and distress of the adverse party.

What a bill of
review must
state.

The grounds for the bill of review would also be insufficient, even if the decree had been previously performed.

The bill must be either for error in point of law, apparent on the face of the decree, or for some new matter of fact relevant to the case, and discovered since publication passed, and which could not have been discovered by reasonable diligence before. (2 *Maddock*, 408. 410.)

It is either for
error of law, on
the face of the
decree, or for
new and relevant
matter of
fact, discovered
since the decree.

The error in law on which the party relies, is in that part of the decree by which the bond taken by the surrogate to the people, for the fidelity of the guardian, is declared to be binding and available, equally as if it had been taken to the infant. This was a point raised, discussed, and decided, upon due deliberation, and it certainly is not a case of apparent error, within the meaning of the rule. The newly-discovered matter of fact is not supported *by the requisite affidavit. The fact relied on is, that two several notes, with which the guardian was charged in the bill, and in the decree, had been previously included in an award made in an arbitration between *Blachly*, the guardian, and *Brush* and

[* 492]

1817.

WISER
v.
BLACHLY.

his wife, as administratrix of the estate of *George Wiser*, deceased, the ancestor of the plaintiff. Admitting the fact, it would be no defence to this suit, for it does not appear that the award has been performed, or the money paid to *Brush* and his wife. Those notes belonged to the infant, and they were received by the guardian from that very administratrix, in behalf of the infant; and if the amount of them has not been received back by the administratrix, it remains still in the hands of *Blachly*, for the plaintiff. The plaintiff could look no where, but to her guardian, for that money, and his saying, that on a voluntary submission between him and the administratrix, those notes had been included in an award against him, and no more, is not saying enough. It may be, that the award is null and void, or discharged by the administratrix. Of itself, it is no payment or discharge.

But an insuperable difficulty, in this part of the case, is, that *Blachly* himself does not come forward and join in this petition, and set up this award. It is his defence, and not that of his surety. He knew of the award before the filing of the bill, if any such award existed, and yet he suffered himself to be charged with those notes in the bill, and made no such defence. In his answer he expressly admits, that he has received, is chargeable, and is ready to account, for one of the notes. This is expressly falsifying the newly-discovered defence. The executors of *Vail*, who now set up, by themselves, this pretext of an award, might, or rather their testator might, have ascertained that fact, by ordinary diligence, when he put in his answer. It was the duty of *Vail* to have inquired of his principal, as to every ground of his defence respecting the notes with *which he was specially charged. The principal knew perfectly well every circumstance attending this award; yet he omitted it, altogether, in the whole progress of his defence, and even charged himself with one of the notes. It is impossible to listen to the suggestion of the surety, that he has, for the first time, heard of such an award. If *Blachly* has thought proper to waive it, and cannot now make it the ground of a bill of review, his sureties cannot make it for him, by saying that they were ignorant of it until now. This would be allowing a most extraordinary abuse and perversion of the just purposes of a bill of review.

The petition, therefore, on every point, is denied, with costs.

Petition denied.

1817.

HAMMOND
v.
M'LEA.

HAMMOND against M'LEA and others.

It seems, that the public administrator in the city of New-York, has no power, (under the act relative to persons dying intestate, &c. in New-York, sess. 38. ch. 157.) to administer on goods which were shipped at a foreign port, and arrived here after the death of the intestate. At any rate, this Court will not interfere, by injunction, in such case, but leave the parties to contest their rights at law.

THE bill, filed May, 1807, stated, that the plaintiff was duly appointed *public administrator* in the city of *New-York*, under the act (sess. 38. ch. 157.) relative to persons dying intestate, and leaving goods and chattels in the said city. That *William Alexander Williams*, late a merchant, resident at *Buenos Ayres*, died there, the 7th of *January*, 1807, leaving goods and chattels now in the city of *New-York*. That he has no widow, or next of kin, resident in *New-York*. That the plaintiff had applied to the surrogate for letters of administration under the statute, and waited for the expiration of the citation, for 30 days, &c. That, in the mean time, the defendants, having obtained possession of goods of the deceased, since his death, had sold part, and threatened to send the residue to *Europe*. The plaintiff prayed for an injunction against selling or parting with the possession of the goods, &c.

June 25th.

[*494]

The answer of the defendants stated, that the goods in question came to his possession, in *April* last, under a consignment from *Brown, Buchanan & Co.* of *Buenos Ayres*, and who shipped the goods from *Buenos Ayres*, since the death of *Williams*. That the defendant paid the freight, &c., and proceeded to sell the goods, and sold part of them, before the injunction was issued and served. That the goods so shipped appeared to belong to the representatives of *Williams*; that the instructions to the defendants were to remit the proceeds to *Europe*, and that they had a *lien* on them, for charges, &c.

Slosson, for the defendants, moved to dissolve the injunction, on the ground, that the case did not come within the act, which provided, "that whenever any person, not resident within this state, shall die intestate, leaving goods and chattels within the city of *New-York*, and the widow, or next of kin, residing within this state, should not, within 30 days after citation, take out letters of administration, the same should be granted to the public administrator," &c.

1817.

REMSSEN
v.
REMSSEN.

[* 495]

THE CHANCELLOR said, he was inclined to think, that the act did not apply to the case, as the goods in question were not here at the death of *Williams*, but were shipped from the *Brazils*, and consigned to the defendants, after his death. If the plaintiff had any rights, he must be left to pursue them at law, under his letters of administration, in case they should be granted. It would *not be proper to interfere with the conflicting claims of third persons, in this way, unless in a case clearly within the act.

Injunction dissolved.

REMSSEN and others *against* REMSEN and others.

General principles on which examinations before a master are to be conducted, regulating and settling the *practice*, as to the mode of taking testimony, on an *order of reference* to a master.

June 13th.

THIS was a question of *practice*, as to the mode of taking testimony, on an order of reference, before a *master*, and came up on the report of *James A. Hamilton*, one of the *masters* of this Court. He stated, that under an order of reference, to take and state an account between the parties in this case, the parties appeared before him, and it was urged by the counsel for the defendant, that the plaintiff should exhibit his charges *in writing*, and that the testimony, in support of the allegations of the parties, should be taken by the master *in writing, privately, upon interrogatories*; and that the depositions so taken should not be disclosed, until the whole evidence of both parties was taken. That, this course of proceeding being objected to, the master decided in favor of the proceeding contended for on the part of the defendant, as being according to the established practice of the Court.

J. Stoughton, for the defendants, contended, that proceedings before a master, in respect to the taking of testimony, were analogous to the proceedings in the cause before publication, and that the charges, interrogatories, and *examinations of witnesses, should be in writing; and that the same policy which dictated secrecy with respect to the testi-

[* 496]

mony previous to the hearing, dictated it in respect to the testimony adduced before the master. The same evils were to be dreaded, and the same remedy to be applied. He cited 1 *Turner's Pr.* 103—5. 110. to show that the practice in *England* is to prepare and file interrogatories, which are settled by the master, for the examination of a party. That the charges of the plaintiff, or his statement of the several items or matters claimed, are in writing, and of which the forms are given in the books. (1 *Turn.* 115. 118. 2 *Turn.* 631. a.) That the defendant pursues a similar course, in respect to his charges and discharges. (2 *Turn.* 640. &c. 1 *Turn.* 204.) That the interrogatories for the examination of a party are drawn by the opposite party, and settled by the master. That each party draws his interrogatories for the examination of witnesses, and files them with the master, and serves them on the opposite party. That the counsel draw and settle interrogatories for the examination of witnesses; and these are not settled by the master, as in the case of the examination of a party. (1 *Turner*, 125, 126. 2 *Harr.* 102.) It was settled, in *Parkinson v. Ingram*, (3 *Ves.* 603.) that it was the practice for the master himself to examine the witnesses, on an order of reference. That the practice in this state had, indeed, been more loose and irregular; but there was no judicial sanction of any departure from the *English* practice, which is more precise and accurate, and tends more to despatch. He contended, that, to prevent abuse, the depositions of the witnesses should be kept private, until the whole of the testimony was closed; and he referred to the case of *Shepherd v. Collyer*, in 1744, cited in *Parkinson v. Ingram*, (3 *Ves.* 608.) as being a decision that depositions before the master are to be kept private, until the testimony before him is closed.

1817.

REMSER
v.
REMSER.

**Riggs*, contra, said, that the practice in the *English* Court of Chancery, on the points mentioned in the report, was not very clearly stated in the books. That the practice, as laid down by *Turner*, was not supported by any adjudication; nor does his book hold up the idea that the examination of the witnesses before the master was to be in secret. The case of *Parkinson v. Ingram* decided nothing on that point, and only settled, that the testimony on a reference was to be taken by the master, and not by the examiner. That the practice which had prevailed here was more easy and convenient, and tended more to cheapness and despatch, than that which had been laid down in the master's report. That in *England* orders of reference are drawn with great care and precision, according to established forms, and contain

[* 497]

1817.

REMOEN
v.
REMOEN.

[* 498]

the principles upon which the account is to be taken ; that the masters there are distinguished lawyers, devoting their time exclusively to the duties of that office ; that solicitors are a distinct class of the profession, and the clerks of the Court are the agents of the parties ; all which circumstances may justify a course of practice in *England*, that would not be altogether proper here. It is laid down in *Wyatt's P. R.* (364.) that parties were, at their peril, to make full proof before publication, and that, on a reference, if any particular points were not fully proved, or could not properly be examined before the hearing, the master must direct the parties to draw interrogatories to such points. That, as a general rule, it might be proper that charges and discharges should be in writing ; but it cannot be proper that the parties should, at their peril, reduce every thing to writing, by way of charge and discharge, in the first instance, because, in the progress of taking the account, new items may arise, which can only be specified when they are developed. The rule must be subject to reasonable exceptions. He contended, that it appeared from *Wyatt's P. R.* 364. and *Cur. Cancel.* 427, 428., that investigations and admissions take place orally before the master ; for he is to make a note of what is admitted, which the party is to sign, and he appoints the time and place for the parties, with their counsel, solicitors, clerks, &c. to attend. He admitted, that witnesses were usually examined before the master, in *England*, on written interrogatories ; but he insisted, that it was no where laid down, that this mode was indispensable, and he wholly denied the authority and practice of secret examinations before the master. He said, that if the parties were compelled, at their peril, to examine, in full, before publication, and if orders of reference were so drawn as to show what had been decided, and the principles on which the taking of the account was to proceed, and no witness was allowed to be examined before the master, who had been examined in chief, without a special order, and if such second examination was to be confined to new points, as is the doctrine in the books, (2 *Dickens*, 508.) the principles of the Court would be maintained.

The testimony taken before the master, whether in writing or not, never comes before the Court as the testimony in chief does, unless the master is directed to send it up, and then it is not filed, so as to form part of the record, as is the case with the testimony in chief. The examination of the parties, on taking an account, is never of course, but is done on special order, grounded on special reasons appearing to the Court.

THE CHANCELLOR. I am not surprised that there should be doubts as to the practice in this case. So late as *Parkinson v. Ingram*, (3 *Vesey*, 603.) it was a serious question, whether the master could take the examination of a witness in any case, and whether all examinations, as well after as before a decree, must not be taken by the examiner. But it was declared, in that case, to be the settled practice for the master to take the examinations on references before him; and it would seem that the witnesses were summoned, *under the usual *subpœna*, to appear, and answer; and that the label to it was the only part which explained where, and before whom, he was to go for examination; and if a commission was necessary to examine witnesses in the country, the master certified the fact, and the commission issued of course.

The only inquiry now is, in what manner testimony ought to be taken before the master.

The books assume the practice to be settled, that the parties and witnesses are to be examined before the master upon written *interrogatories*; and that in the case of the examination of a party, the interrogatories are settled by the master, and in the case of a witness, they are settled by the counsel. (The attorney-general *arg.* in *Parkinson v. Ingram*, *sup.* *Stanyford v. Tudor*, *Dickens*, 548. *Hughes v. Williams*, 6 *Vesey*, 459. *Purcell v. Macnamara*, 17 *Vesey*, 434. and cases cited upon the argument.) Sometimes the master is directed to settle the interrogatories in the case of a witness, as in *Browning v. Barton*, (*Dickens*, 508.) and exceptions may be taken to the interrogatories as settled by him. (6 *Vesey*, 759.) But though the exhibition of interrogatories, duly settled, be the usual mode of examination, appearing in the books, I do not apprehend that it is indispensable. The practice with us, as I have reason to believe, has been more relaxed, and oral examinations have frequently, if not generally, prevailed. This appears to me to be a question merely of convenience, and does not involve any principle of policy, or of right; but whether examinations shall be secret, and to what extent they shall be carried, suggests much more important considerations.

If examinations are protracted, from day to day, for any length of time, there is very great danger of abuse from public examinations, by which parties are enabled to detect the weak parts of the adversary's case, or of their own, and to hunt up or fabricate testimony to meet the pressure *or exigency of the inquiry. It is to guard against this abuse, that examinations in chief are not permitted, after publication, and that Courts of law will not grant new trials, merely to enable a party to accumulate testimony on any given point,

1817.

RENSSEN
V.
RENSSEN.

[* 499]

[* 500]

1817.

REMSKEN
v.
REMSKEN.

or to oppose that which was taken on the opposite side. It is also upon the same grounds, that a witness, who has been examined in chief before the hearing, cannot be re-examined before the master, without an order, and, then, not to any matter to which he had before been examined; (*Dickens*, 508.) and that a witness, once examined, before the master, cannot be re-examined, without an order. (2 *Ves.* 270. 2 *Maddock's Ch.* 392, 393.) In trials at common law, the cause is heard, and the verdict taken at one sitting, and all opportunity for getting up supplementary proof is precluded.

On the other hand, there are many inconveniences (which were alluded to by the counsel) to be apprehended, from requiring all depositions to be secret, on taking an account before the master. In long and complicated accounts, it seems almost impossible to reduce the requisite inquiries to writing, in the first instance, and to know what questions to put, except as they arise in the progress of the inquiry; and it is a little surprising that no clear and decided evidence can be found, in the books, of the practice of secret examinations, if such be, indeed, the settled practice in the *English* chancery.

The general rules which are to be deduced from the books, or which ought to prevail on the subject of examinations before the master, and which appear to me to be best calculated to unite convenience and despatch with sound principle and safety, are,

1. That the parties should make their proofs as full, before publication, as the nature of the case requires or admits of, to the end that the supplementary proofs, before the master, may be as limited as the rights and responsibilities of the parties will admit.

[* 501]

*2. That orders of reference should specify the principles on which the accounts are to be taken, or the inquiry proceed, as far as the Court shall have decided thereon; and that the examinations before the master should be limited to such matters within the limits of the order, as the principles of the decree or order may render necessary.

3. That no witness in chief, examined before publication, nor the parties, ought to be examined before the master, without an order for that purpose, which order usually specifies the subject and extent of the examination; and a similar order seems to be requisite when a witness, once examined, is sought to be again examined before the master, on the same matter. But it is understood to be the settled course of the Court, (1 *Vern.* 283. *anon.* 1 *Vern.* 470. *Witcherly v. Witcherly.* 2 *Ch. Cas.* 249. *Everard v. War-* 386

ren. *Mosely*, 252. *Morely v. Bonge*. *Robinson v. Cumming*, 2 *Atk.* 409. and 2 *Fonb.* 452. 460, 461, 462.) that upon the defendant accounting before the master, he is to be allowed, on his own oath, being credible and uncontradicted, sums not exceeding 40 shillings each; but then he must mention to whom paid, for what, and when, and he must swear positively to the fact, and not as to belief only, and the whole of the *items*, so established, must not exceed 100*l.*, and the defendant cannot, by way of charge, charge another person in this way. The *forty* shillings sterling was the sum established in the early history of the Court, and, perhaps twenty dollars would not now be deemed an unreasonable substitute.

4. That the master ought, in the first instance, to ascertain from the parties, or their counsel, by suitable acknowledgments, what matters or *items* are agreed to or admitted; and then, as a general rule, and for the sake of precision, the disputed *items* claimed by either party ought to be reduced to writing by the parties, respectively, by way of charges and discharges, and the requisite proofs *ought then to be taken on written interrogatories, prepared by the parties, and approved by the master, or by *viva voce* examination, as the parties shall deem most expedient, or the master shall think proper to direct, in the given case. That the testimony may be taken in the presence of the parties, or their counsel; (except when by a special order of the Court it is to be taken secretly;) and it ought to be reduced to writing, in cases where the master shall deem it advisable, by him, or under his direction, as well where a party as where a witness is examined.

5. That in all cases where the master is directed by the order to report the proofs, the depositions of the witnesses should be reduced to writing by the master, and subscribed by the witnesses, and the depositions returned with his report to the Court.

6. That when an examination is once begun before a master, he ought, on assigning a reasonable time to the parties, to proceed, with as little delay and intermission as the nature of the case will admit of, to the conclusion of the examination, and, when once concluded, it ought not to be opened for further proof, without special and very satisfactory cause shown.

7. That after the examination is concluded, in cases of reference to take accounts, or make inquiries, the parties, their solicitors, or counsel, after being provided by the master with a copy of his report, (and for which the rule of the 1st of *November* last makes provision,) ought to have a day as-

1817.

REMSER
v.
REMSER.

[* 502]

1817.

MATTER OF
COSTER

signed them to attend before the master, to the settling of his report, and to make objections, in writing, if any they have; and when the report is finally settled and signed, the parties ought to be confined, in their exceptions to be taken in Court, to such objections as were overruled or disallowed by the master.

[* 503]

These being the general principles on which examinations before the master are to be conducted, I shall direct, that so much of the master's report, in this case, as contains *a decision, that the testimony be taken privately, and exclusively upon interrogatories in writing, be overruled; and that the parties be at liberty to examine the witnesses orally unless the master shall determine, for special reasons applicable to that examination, or any part of it, that the interrogatories ought to be reduced to writing.

Order accordingly.

In the matter of JOHN G. COSTER.

Where, on a sale of mortgaged premises under a decree, the bond is fully paid, the obligor is entitled to have the bond and mortgage delivered up to him and cancelled.

The obligee, or purchaser of the mortgaged premises, is not entitled to retain them in his hands for his own convenience, or for greater security of his title under the decree, without the assent of the obligor.

But a third person, who pays off mortgage debts, for his own security, may be substituted in the place of the obligor, or mortgagor, and retain the bond and mortgage.

THE petitioner stated, that on the 18th of *April* last, he purchased the building called *Washington Hall*, under a decree of this Court. That *Isaac Sebring*, and four other persons, as trustees of the stockholders of the said hall, mortgaged the premises to *Henry A. Coster*, to secure the payment of a bond executed by the said *Isaac Sebring*, for the payment of 25,000 dollars. That the trustees mortgaged the premises to *John Van Vechten*, for the use and indemnity of *Sebring*. That the premises were sold under a bill and decree, in favor of the said *Van Vechten* and *Sebring*, in which suit *Henry A. Coster* was made a defendant; and upon such sale, the bond has been fully paid. That to

388

render the title of the petitioner, under the decree, *more secure, he wishes to obtain from *Henry A. Coster* an assignment of the bond and mortgage; but *Sebring* objects to it, as it regards the bond, though the petitioner is willing the assignment should be so made, that *Sebring* and his representatives can never become answerable.

He prayed, therefore, for an order for the assignment of the bond and mortgage, as the Court might direct.

Riggs, for the petitioner.

Boyd, contra.

THE CHANCELLOR. The obligor, having discharged his bond, is entitled to have it delivered up and cancelled. Neither the obligee, nor any other person, is entitled to retain it, for their convenience, without his assent. As there is no objection by the mortgagee to the assignment of the mortgage, the petitioner may take it; but the bond must be delivered up to the obligor, to whom it now belongs; and, if it had been insisted, the mortgage must have, also, been delivered up to him. A third person, discharging a bond and mortgage for his own safety, may be substituted, but when the maker discharges them, he is clearly entitled to have the instruments cancelled. The prayer of the petition is so far denied.

Petition denied.

389

1817.

MATTER OF
COSTER.

1817.

EXECUTORS OF
BRASHER
V.
CORTLANDT.

*EXECUTORS OF BRASHER *against* CORTLANDT, a lunatic, by his committee, &c.

A purchaser under a decree of the Court, at a master's sale, may be compelled to complete the purchase; and the Court, where the conditions of the sale give no alternative to the purchaser, will exercise its discretion, under the circumstances of the case, in coercing the purchaser by an attachment.

July 2d.

CRAIG, for the plaintiff, moved for an attachment against *Stephen S. Clay*, for refusing to complete a purchase, in this case, made on a master's sale, under the decree of the Court.

On the 12th of *March* last, it was decreed, that so much of a tract of land, of 480 acres, in *Yorktown*, in *Westchester* county, belonging to the lunatic, as should be sufficient to raise 736 dollars 24 cents, with interest from the 30th of *October* preceding, and costs, be sold, &c.

On the 5th of *June* last, 100 acres of the tract were sold by a master, in pursuance of the decree, and struck off to *Stephen S. Clay* for 16,000 dollars, who paid 50 dollars as a deposit. The sale was confirmed by an order of the Court on the 9th of *June*, and the master was directed to execute and deliver a deed to the purchaser, and receive the purchase money, &c. In pursuance of this last order, the master had executed, and tendered, a deed to the purchaser, who peremptorily refused to pay the purchase money and receive the deed. On the 25th of *June*, it was ordered, that *Clay* complete his purchase by paying the purchase money, with interest from the time he was reported the highest bidder; or that he show cause, by the 30th of *June*, why an attachment should not issue against him.

[* 506]

Clay now showed cause, by stating, that he was requested by *Wm. R. Van Cortlandt, jun.*, one of the committee, to become a purchaser, in behalf of him, *Wm. R. Van Cortlandt*. That it was then represented to him, that it was intended to appeal from the decretal order of the 12th of *March* last; and the request for him to purchase was to prevent the possibility of loss, in case the decree should be affirmed. That he became a purchaser from motives of friendship for *Wm. R. Van Cortlandt*. That after the sale, he was again informed that an appeal was intended, and would prevent the necessity of his complying with the purchase, and he, accordingly, took no measures to complete it.

It further appeared, that an appeal had been filed in this cause, on the 1st of *July* inst.; and that the solicitor for the defendants had advised them it could not be done, until after the sale had been made and confirmed.

1817.

EXECUTORS OF
BRASHER
V.
CORTLANDT.

Baldwin, for the defendants, resisted the motion for an attachment, on the ground, principally, that an appeal had been interposed, which ought to arrest all the proceedings.

THE CHANCELLOR. The purchaser ought, in this case, to be compelled to complete his purchase. Such an order was made in the case of *Lansdown v. Eldon*, (14 *Vesey*, 512.) and several cases of the like kind, in the Court of Exchequer, were there referred to. The lord chancellor, in that case, ordered the purchaser to pay his purchase money within a fortnight, or stand committed; and he observed, that a purchaser could not be permitted to baffle the Court. If no order of this kind could be made in this case, it would follow that not only the purchaser, but the committee of the lunatic, would be permitted to baffle the Court, and sport with its decree. The committee, who are in possession of the lunatic's property, and have apportioned it among them, as his children, and who have admitted the justice of the plaintiff's debt, have, already, in the former progress of this suit, shown a disposition to *embarrass and defeat the recovery;† and they now procure a nominal purchaser, without any intention, on his part, or on their part, that the purchase should be carried into effect. This is to me quite apparent. The appeal is, also, interposed after the decree for a sale had been essentially executed, and it cannot be permitted to supersede the completion of the purchase. I do not mean, at present, to lay down any general rule on the subject of coercing a purchaser by attachment; but I ought not to hesitate, under the circumstances of this case; and I have no doubt the Court may, in its discretion, do it, in every case, where the previous conditions of the sale have not given the purchaser an alternative. Here it has become necessary, in order to give due effect to the authority and process of the Court, and to preserve them from being treated with contempt. The forfeiture of the deposit would not be sufficient, either as a punishment to the one party, or as a satisfaction to the other. In *Savill v. Savill*, (1 *P. Wms.* 745.) where the Court would not make an order on the purchaser to complete his purchase, but thought the forfeiture of the deposit, which the purchaser elected to lose, sufficient, the deposit was about one tenth of the purchase money, and the learned editor, Mr. *Cox*, adds a *quare*, whether that case be now the law of the Court.

[* 507]

† *S. C. ante*,
p. 243. 400.

1817.

~
 HAMERSLEY
 v.
 LAMBERT.

I shall order, that the purchaser pay the purchase money in six days, or that an attachment issue.

Order accordingly.

[* 508]

*HAMERSLEY *against* LAMBERT and others.

This Court gives relief against the representatives of a deceased partner who has left *assets*, if the surviving partner be insolvent. And the defendants cannot object a want of due diligence in the creditor, in not prosecuting the surviving partner, before insolvency. No delay, in this respect, nor lapse of time, nor dealing with the surviving partner, or receiving from him a part of the debt, will amount to a waiver, or bar of the claim on the *assets* of the deceased partner. For it is a joint and several debt, and the assets of the deceased partner remain liable until the debt is paid. Besides, the discharge of the surviving partner under the insolvent act, is a good plea in bar to a suit against him.

That a suit was brought by the plaintiff, as trustee for an *alien enemy*, is no objection, after the war, as the suit was not abated during the war, and the disability merely temporary.

July 8th.

JOHN BEDIENT and *Walter Hubbell* were partners in trade, prior to 1803. The partnership was dissolved, by the death of *Hubbell*, in *September*, 1803. At his death, the firm was indebted to *Thomas Holmes*, of *Bristol*, in *England*, who died in 1808; and, on his estate, letters of administration were granted, in this state, to the plaintiff. Moneys were paid to *Holmes*, on account, in 1806, by *Bedient*, the surviving partner; and on the 1st of *January*, 1807, a balance of 3,393 dollars, 32 cents was admitted, by *Bedient*, to be due. In *October*, 1807, *Bedient* was discharged under the insolvent act of this state. The bill was filed in *May*, 1814, against the assignees of *Bedient*, the insolvent, and against the heirs and administrators of *Hubbell*. In 1809, the guardian of the two infant heirs of *Hubbell* paid into Court 8,041 dollars, 88 cents, belonging to the infants, which was invested in public stock. The balance due to the estate of *Holmes* was admitted by the administrators of *Hubbell* in their answer; and the insolvency of *Bedient* was proved by his discharge, produced as an exhibit, as well as admitted by his assignees in their answer.

[* 509]

**G. Brinckerhoff*, for the plaintiffs, contended, that the
 392

surviving partner being insolvent, the estate of the deceased partner was chargeable, in equity, with the whole debt.

1817.

HAMERSLEY
V.
LAMBERT.

Burr, contra, contended, that the demand was not sufficiently proved; that there had not been due diligence in collecting the debt against *Bedient*. That the discharge of *Bedient* was no bar to this demand, belonging to an *English* subject, resident abroad; and that the suit was commenced on his behalf, while he was an alien enemy.

THE CHANCELLOR. All the objections must be overruled. The plaintiff is entitled to receive the debt out of the assets of the deceased partner. The demand was sufficiently admitted; and interest was to be cast on the balance liquidated and acknowledged on the 1st of *January*, 1807. It is well settled, that relief may be had in equity against the representatives of a deceased partner leaving assets, if the surviving partner be insolvent. This was the principle declared by Lord *Hardwicke*, in the case of *Simpson v. Vaughan*, cited in 2 *Vesey*, 101.; and the point was established in the Court of Errors, in this state, in *Jenkins v. Degroot*, (1 *Caines's Cases in Error*, 122.) and admitted as a rule of equity in the Circuit Court of the *United States*. (*Reimsdyk v. Kane*, 1 *Gall. Rep.* 371. 630.) The defendants cannot set up a want of due diligence in not prosecuting *Bedient* before his insolvency; for the demand was equally the debt of both partners; and the consideration from which it arose, is to be presumed to have equally assisted both of them. The doctrine of due diligence, and of prompt notice, as arising upon claims against drawer and endorser, is not applicable. For this I may generally refer to the adjudged cases in which the subject has been discussed. (*Lane v. Williams*, 2 *Vern.* 292. *Heath v. Percival*, 1 *P. Wms.* 682. *Bishop v. Church*, 2 *Vesey*, 100. 371. **Daniel v. Cross*, 3 *Vesey*, jun. 277. *Stephenson v. Chiswell*, 8 *Vesey*, jun. 566. *Gray v. Chiswell*, 9 *Vesey*, 118. *Ex parte Kendal*, 17 *Vesey*, 514. *Orr v. Chase*, app. to 1 *Merivale's Rep.* 729.) But I would specially notice the recent decision of *Devaynes v. Noble*, (1 *Merivale's Rep.* 539. 572.) in which the question was fully and ably considered, how far a creditor loses his right in equity, to resort to the assets of a deceased partner, by delay in calling for his debt from the survivor. It was ruled by Sir *Wm. Grant*, the master of the rolls, after a full examination of the cases, that the creditor who continued, for a considerable time after the death of one partner, to deal with the survivor, and to receive partial payments from him, had, notwithstanding, a valid right to resort

[* 510]

1817.

HAMERSLEY
v.
LAMBERT.

to the assets of the deceased partner, though the survivor, in the mean time, had become bankrupt, and the creditor had signed his certificate as a bankrupt. There was no period fixed, as he observed; nor did convenience require any fixed period within which a creditor, by not making his demand upon the surviving partner, should be held to have waived his equity against the estate of the deceased partner. If creditors, in order to preserve their recourse against the estate of the deceased partner, were bound to use all possible diligence to compel an immediate payment by the survivor, there are very few mercantile houses which could stand such a sudden and concurrent demand as that would necessarily bring upon them. If the estate of the deceased partner be, in any case, released, (as Lord Eldon, in the case *ex parte Kendal*, supposes *might* happen,) it would require a course of dealing, founded on peculiar circumstances, not exactly defined, between the creditor and the survivor, to rebut the equity of the claim against the estate of the deceased; to shift the obligation to pay from that estate, and fix it exclusively on the survivor. It was so far held in this very case of *Devaynes v. Noble*, (p. 585. 611.) that where the creditor continued to deal with the *survivors, being a banking house, by drawing out and paying, the balance varying, from time to time, but being, upon the whole, increased by such subsequent dealings, the subsequent payments, by the surviving partners, were to be taken, in reduction of the balance due at the death of the one partner, and his estate held discharged *pro tanto*. But this case fully established the doctrine, that neither delay, nor lapse of time, nor dealing with the survivor, nor calling for, and receiving part of, the debt from the survivor, amounts to a waiver, or bar, of the claim upon the assets of the deceased. It is, in equity, a joint and several debt; and, as Lord Parker observed in one of the cases, the assets of the deceased *must lie at stake, until the bond be paid*.

[* 511]

Such is the amount of the decision in the case of *Devaynes v. Noble*, and which is of great weight, from the full and accurate consideration which the whole subject received. I confidently conclude, as well from the respect which that decision deserves, as from my own examination of the cases referred to, that the opinion of the master of the rolls was a correct exposition of the law on the point.

But to return to the other objections on the part of the defendants. The discharge of *Bedient* under the insolvent act was within four years of the death of *Hubbell*; and that discharge is a good plea in bar in our own Courts to any suit, by any creditor. This was so ruled in *Penniman v. Meigs*. (9 Johns. Rep. 325.) There is as little force in the
394

objection, that the plaintiffs brought the suit as trustee for an alien enemy. The suit not being abated during the late war, cannot now be abated on the ground of a temporary disability which has long since ceased.

I shall, accordingly, direct a reference to ascertain the amount due, and decree the payment thereof out of the assets in Court.

Decree accordingly.

1817.

LIVINGSTON
V.
HUBBS.

*LIVINGSTON *against* HUBBS and others.

[* 512]

Where *B.* obtained from *L.* a deed for land, through fraud, in which *H.* was concerned, and *B.* afterwards confessed a judgment to *H.*, who assigned it to *R.* for a valuable consideration, and without notice of the fraud, it was held, that the deed to *B.* being null on account of the fraud, the judgment created no valid *lien* on the land; that *R.* took the assignment at his peril, and subject to all the existing rights of the debtor; and the land was decreed to be reconveyed, discharged from the judgment, and a perpetual injunction awarded.

THE bill charged, that *Daniel Baldwin*, in his lifetime, procured a deed from the plaintiff, of a house and lot, in *Brooklyn*, by fraudulent representations and practices; and that the defendant *Hubbs* was concerned with *Baldwin* in the fraud; and that, immediately after the deed was so procured, *Baldwin* confessed a judgment to *Hubbs* for 839 dollars, which *Hubbs*, shortly thereafter, assigned to the defendant *Robbins*, and, as the bill charged, with knowledge of the fraud.

July 8th.

After the answers of the defendants, the cause was put at issue, and proof taken, and the cause set down for hearing.

Baldwin, and *Sampson*, for the plaintiff.

Brackett, *Tucker*, and *Burr*, for the defendants.

THE CHANCELLOR. The allegation of fraud is abundantly established; and the only point admitting of any real discussion is, how far *Robbins*, who appeared to be a purchaser of the judgment for a valuable consideration, and to whom no charge of fraud could be imputed, was to be protected in his *lien* on the land. *Robbins* purchased the judgment subject

1817.

LIVINGSTON

v.

HUBBS.

[* 513]

† *Ante*, 461.

to all the equity of the plaintiff against it, while it existed in the hands of *Hubbs*; and as the title of *Baldwin* was infected with gross fraud, it was *null from the beginning. The fraudulent judgment, therefore, created no valid subsisting lien. The title to the land never passed from the plaintiff; and there is no rule of law, or equity, to protect the judgment in the hands of *Robbins*, though he may be an assignee for a valuable consideration, without notice of the fraud, for he took the assignment of the judgment at his peril. He took it subject to all the existing rights of the debtor; and these rights could not be varied, or affected, by the assignment, though, perhaps, the right of a third person, depending upon a secret trust, might be affected. (*Murray & Winter v. Lylburn* and others.)† The judgment was not an article of ordinary commerce, and it would be repugnant to justice and sound policy, to permit fraud to be successful by such a contrivance.

The land, therefore, must be decreed to be reconveyed to the plaintiff, discharged of the judgment, and a perpetual injunction awarded against the execution of the judgment upon that land.

Decree accordingly.

1817.

HART
V.
TEN EYCK

HART *against* TEN EYCK and others.

In an *order of reference* to a master, the defendant may be directed to produce before the master, on oath, all *books, papers, &c.* in his custody or power, and may be examined, on oath, upon such interrogatories as the master may direct, relative to the transactions set forth in the pleadings.

MOTION on the part of the defendants, to strike out the following part of the decretal order of the 5th of last *May*, viz.:—"And that, for the better taking the said account, and discovery of, and concerning the several matters aforesaid, the parties shall produce before the said master, on *oath, all books, papers, and writings, in their custody or power, or in the custody or power of any of them, relating thereto, and shall be examined upon interrogatories as the said master shall direct;" or that the order be so modified as to require the production of such books and papers only as are expressly referred to and admitted in the defendant's answer.

July 19th.

[* 514]

Woodworth, and *Van Buren*, (attorney-general,) for the motion.

Henry, and *Van Vechten*, contra.

For the motion, it was contended, that the order went beyond the decree in the Court of Errors,† to which this Court ought to conform; and that it was, also, contrary to the principles of the Court, by which a party in interest cannot be examined on oath, nor compelled to produce papers under oath. It was observed, further, that the disclosures of a defendant in interest, must, at any rate, be required by the bill, and given in the answer; and that a party in interest is not to be examined on interrogatories before hearing. It was admitted by one of the counsel for the motion, that after hearing, and when an account is to be taken, the parties may, by order of the Court, be examined on oath touching such account, but the examination of the party is to be confined to the *items* of the account, and cannot, and ought not to be extended to the several matters in respect to which a reference was, by the decree of the Court above, directed to be made, because the Court has not passed on the merit of those matters.

† On appeal from the decree in this case, ante, p. 62. 122.

1817.

HART

V.

TEN EYCK.

[* 515]

The counsel for the defendants cited 1 *Johns. Ch. Rep.* 189. 2 *Fowler's Ex. Prac.* 251. *Bohun's Cur. Can.* 244. 305. *Wyatt's P. R.* 161. 169. *Hinde's Pr.* 356. 2 *Madd. Ch.* 316. *Amb.* 583. 1 *Vesey*, 451. 2 *Vesey*, 222. **Dicken's Rep.* 382. 800. 8 *Vesey*, 159. 2 *P. Wms.* 409. 3 *P. Wms.* 35.

Against the motion, it was urged to be the general and settled practice of the Court, to require parties to be examined on oath, in cases of reference to a master, and that the party, in matters of account, can clear himself by his own oath, as to charges under 40s. (*Remsen v. Remsen*, ante, 495.) That discovery from the party, as to matters resting in account was one great basis of the jurisdiction of the Court. That he cannot protect himself from discovery, on the ground of interest, but only on the ground that the discovery would expose him to penalties or criminal prosecution. That the objection to discovery must be special and personal in its nature; and if a discovery would contradict the answer, and thereby criminate the party, he might raise that as an objection, and it would be good. That the disclosure is essential in cases of trust, and it would be monstrous to allow a trustee to shield himself from disclosing every matter relating to his trust; and that none of the cases cited on the other side were cases of trust. -

The counsel for the plaintiff cited 1 *Harr. Prec.* 201. (8 edit.) *Turn. Prac.* 111. 2 *Fonb.* 484. (n. e.) *Wyatt*, 198.

THE CHANCELLOR. It was admitted by one of the counsel, in support of the motion, as a settled point, that on references to take and state an account, the Court may direct the parties to be examined on oath, by the master. This appears to be the long-established practice of the Court; and it is considered, in the books, as a thing very much of course. Thus, in *Purcell v. M'Namara*, (17 *Vesey*, 434.) Lord *Eldon* considered it as the usual direction, to examine the parties as the master shall see fit, and that he settles the interrogatories. So Lord *Hardwicke*, in *Cowslade v. Cornish*, (2 *Vesey*, 270.) admitted it to be a general direction in a decree, to examine the parties on interrogatories before the master, as he shall direct, and he said the party might be interrogated, *toties quoties*. The *same order was made by him in *Kirkpatrick v. Love*, (*Amb.* 589.) and by Lord Chancellor *Talbot*, in *Piddock v. Brown*, (3 *P. Wms.* 238. Probably, not a volume of reports can be opened, without meeting with instances of the practice. (*Bromly v. Child*, *Dickens*, 123. *Cornish v. Acton*, *Dickens*, 149.)

The practice, itself, is, according to the constitution of

[* 516]

the Court, which appeals to the conscience of the party. A right to discovery, by the party's own oath, is one of the original and most essential heads of equity jurisdiction. The objection to the order in this case, if of any force, can be so only because the order grants other or further relief than that prescribed by the Court of Errors, or because the order carries the examination of the party to points or cases not within the practice of the Court.

I cannot find, in the decree of the Court of Errors, any direction on this point. The Court ordered a reference to a master on various points involved in the case; and it undoubtedly intended that the reference should be conducted according to the usual course. It pointed out the subjects of inquiry and reference, and not the details and nature of the proof. The Court of Chancery was left to its usual discretion, on the mode of conducting the reference. Indeed, the parties and the master are directed, by the Court of Appeals, to apply, from time to time, to the chancellor for his directions.

Nor do I perceive that the order carries the examination of the party to any unusual or unreasonable extent. The order is general in its terms, as such orders usually are; and it is for the party to object, when any question is put that would lead to a violation of the restrictions that are properly imposed on such examinations. The cases that were cited, in which it is laid down that a party in interest cannot be examined as a witness, apply only to examinations in chief, before hearing. Not one of them relates to references before a master. Every defendant, notwithstanding **his* interest, is bound to answer, in the first instance, under oath, to the charges in the bill; and having thus answered, as a party, it is said, that he should not be examined in chief, in the character of a mere *witness*. But when a reference is ordered upon hearing, then the inquiry becomes necessarily minute, and a new and more detailed investigation is opened, to which the general inquiries in the bill were not adapted. Here the same policy and principles of the Court, which required an answer to the bill, apply, and call again upon the conscience of the party *as party*, for a further disclosure adapted to the *minutiae* of the inquiry. The same reasons which required an answer, in the first instance, require an examination in the second; and when the party against whom these inquiries are directed, is charged, not on his own account, but as *trustee*, the reason, fitness, and necessity of the disclosure, strike the mind with peculiar force.

It does not appear to me that there is any ground, either

1817.

HART
V.
TEN Eyck.

[* 517]

1817.

HART
v.
TEN Eyck.

on principle or authority, for a distinction arising out of the subject matter of the reference, in respect to the examination of the party. The reference, in every branch of it, under the decree in this case, is to ascertain *facts*; and the party's disclosure, on oath, is just as reasonable and as necessary, in one case, as the other. The bill could not have been framed and adapted to meet the fulness and minuteness of the inquiries under the reference; and it is the fundamental doctrine of this Court, that the party is bound to answer on oath, to *every fact* material to the right of the plaintiff. The disclosure must be made, either by the answer to the bill, or by examination before the master. In one way or the other, the truth is to be sifted out, and the conscience of a defendant probed to its deepest recesses.

The usual subject of a reference, is the taking and stating an account; but I apprehend there is no case which confines the exercise of the power of the Court, as to the examination *of parties to that kind of reference; and the reason of the rule, and, no doubt, the practice, applies to references in general.

[* 518]

In *Smith v. Turner*, (3 P. Wms. 412.) the defendant was examined on oath, on interrogatories, after hearing, touching a deed supposed to be in his custody. So in *Gower and Baltinglass*, (1 Ch. Cas. 66.) the defendant, after several answers, was examined on interrogatories, respecting a trunk of papers in her possession. The like order was made in *Suffolk v. Greenville* (3 Ch. Rep. 50.) The books are full of orders of this kind, applicable to all kinds of inquiry, as well as to matters of account. (*Cary's Rep.* 45. *Tothill*. 134. 148, 149.) In *Parkhurst v. Lowton*, (1 Merivale's Rep. 395.) an order was made, after answer, that the defendant, who was an executor, produce on oath, and leave with his clerk in Court, all deeds, books, writings, &c. mentioned in the schedule to the answer; and in *Fenwick v. Reed*, (1 Merivale, 119. 126. and *Appendix*, p. 723.) a similar order was made upon a defendant, after answer, and it extended to all papers relative to the transactions, &c. The rules of Lord Bacon (No. 70.) also provided, that a defendant might be examined on interrogatories, in very special cases, to sift out some fraud or practice.

The case of a trustee, called to account by the heir of the *cestui que trust*, is one of the strongest that can be imagined. to illustrate the necessity of such a jurisdiction, and the wisdom of the rule. The rights of such a *cestui que trust* can only be duly ascertained, by a full and frank disclosure of every fact, and of every paper or document resting in the knowledge or power of the trustee, and called for by the

general terms of the bill, or, more particularly and specially, by the nature of the inquiries which are directed before the master. A reference in such cases, under the usual order, has the effect of a supplemental bill of discovery ; and I am persuaded that I shall be pursuing *the spirit and intention of the decree of the Court of Appeals, as well as acting in conformity with the known equity and principles of this Court, if I require every material disclosure, not implicating the party in pains and penalties, which it is in the power of the party to make.

The motion in the present case is not against any particular interrogatory, or examination, under the general order of the Court, but it is against the order itself. The motion is, consequently, denied.

Motion denied.

1817.

HART

TEN V. EVCK.

[* 519]

1817.

ABBOTT
V.
ALLEN.

ABBOTT *against* ALLEN, executor of ALLEN.

A purchaser of land, who has paid part of the purchase money, and given a bond and mortgage for the residue, and is in the undisturbed possession, will not be relieved against the payment of the bond, or proceedings on the mortgage, on the mere ground of a defect of title, there being no allegation of fraud in the sale, nor any eviction; but must seek his remedy at law, on the covenants in his deed.

August 12th.

[* 520]

THE bill stated, that, in the year 1805, the testator offered to sell to the plaintiff a farm, which he then possessed, at a fair price; and represented that he was the true and rightful owner of it, and would give, or procure to the plaintiff, a perfect title; that, giving credit to the testator, the plaintiff, on the 18th of *April*, 1805, agreed to purchase the farm for 2,500 dollars; 1,000 dollars to be paid on receiving the deed, and the residue to be secured by bond and mortgage; that the testator was to give the plaintiff a deed in fee, with full covenants. That the testator, accordingly, with his sons, *Charles Allen*, and the defendant *Alexander Allen, jun.*, executed a deed to the plaintiff, of that date, in fee, with covenants of seisin in fee, and a right to convey, and *for quiet enjoyment, and against encumbrances, and with a general warranty. That his sons were made parties to the deed, at the instance of the testator, and under pretence that they had some right and interest in the farm. That the plaintiff paid the testator 1,000 dollars, and gave a bond and mortgage for the residue of the purchase money; that the plaintiff went into possession, at the execution of the deed, and has occupied the land since, and made valuable improvements thereon. That he paid the interest on the bond down to *June*, 1813, and paid 300 dollars towards the principal, leaving 1,200 dollars for principal, due on the bond, and interest, from the first of *June*, 1813. That his title is now deemed questionable, so that he cannot raise money on the security of the land, or sell it. That the testator could not give the plaintiff any particular explanation about the title; that he has made diligent inquiries concerning the title, and finds that the farm was owned by *Jeremiah Sabin*, who died in possession, in 1790, leaving ten children by his first wife, and one child by his second wife; that by his will, dated 22d of *February*, 1771, he directed his executors to sell so much of his land as should be requisite to pay his debts; and he gave his wife one third of his real estate, and then divided his estate among all his ten children, and appointed his wife

and one son his executors. That his wife died, in his lifetime, after his will, and he married again; and by his second wife had one child, now living, who married the defendant. That this second marriage and child is deemed a revocation of this will. That his heirs, in 1791, set off the said farm to his widow (the second wife) for her dower, and she sold her right, afterwards, to the testator, or father of the defendant; that when the testator and his two sons conveyed to the plaintiff, they had no title, except the conveyance from the widow, and a deed from the surviving executor of *Jeremiah Sabin*, deceased, and a quit-claim from one other of the heirs. That the title of the plaintiff, by the implied revocation *of the will is insecure, as to the shares of all the children, except two; that the defendant is now suing, as plaintiff, on the bond, and advertising a sale of the premises under a power in the mortgage.

The plaintiff prayed that the defendant might perfect the title, or pay the plaintiff for the deficiency; and be enjoined, in the mean time, from all proceedings on the bond and mortgage. An injunction was accordingly granted.

J. Talmadge, for the defendant, now moved to dissolve the injunction, on the facts stated in the bill, and relied on the case of *Bumpus v. Platner*, (1 *Johns. Ch. Rep.* 213.)

Emott, contra, relied on the ground of a failure of consideration, and a purchase under a representation which was not true; and he contended that chancery would grant relief on failure of consideration before eviction, and though possession passed and continued in the plaintiff, provided the case came within the terms of the covenants in the deed. He cited *Co. Litt.* 384. *a. note.* 1 *Fonb.* 366. *Sugden's Law of Vendors*, 316. 1 *Vesey*, 88. 3 *P. Wms.* 307. 18 *Viner*, 113. pl. 9, 10.

THE CHANCELLOR. This case comes within the general doctrine declared in *Bumpus v. Platner*, (1 *Johns. Ch. Rep.* 213—218.) that a purchaser of land, who is in possession, cannot have relief here against his contract to pay, on the mere ground of defect of title, without a previous eviction. But, without resting on the opinion there delivered, I have again examined the question, inasmuch as the doctrine in that case was doubted by the learned counsel who opposed this motion.

If there be no fraud in the case, the purchaser must resort to his covenants, if he apprehends a failure or defect of title, and wishes relief before eviction. This is not the appropri-

1817.

ABBOTT
V.
ALLEN.

[* 521]

1817

ABBOTT
V.
ALLEN.

ate tribunal for the trial of titles to land. It *would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual enjoyment of land, and when no third person asserts, or takes any measures to assert, a hostile claim, can be permitted, on suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase money, and of all proceedings at law to recover it. Can this Court proceed to try the validity of the outstanding claim, in the absence of the party in whom it is supposed to reside, or must he be brought into Court against his will, to assert or renounce a title which he never asserted, and, perhaps, never thought of? I apprehend there is no such practice or doctrine in this Court; and that a previous eviction or trial at law is, as a general rule, indispensable. Perhaps an outstanding encumbrance, either admitted by the party, or shown by the record, may form an exception, in cases of covenant against encumbrance. Some *dicta* in the books (see *Serjeant Maynard's* case, 2 *Freeman*, 1. and 1 *Vesey*, 88.) seem to look to that point; but I have formed no opinion respecting it. The case of fraud is an exception; and it seems to be admitted by Mr. *Butler*. (note 332 to *Co. Litt.* 384. a.) that if the purchaser was imposed on, by any intentional misrepresentation or concealment, he may have redress here, in addition to and beyond his covenants. The late case of *Edwards v. M^r Leay*. (*Cooper's Eq. Rep.* 308.) is to this point. The purchaser, in that case, *before* any eviction was had or threatened, succeeded in a bill to set aside the conveyance, and for a return of the purchase money; but it was expressly upon the ground of fraud and imposition charged and proved; and the master of the rolls, in answer to the objection that the plaintiff was premature, inasmuch as he had not yet been evicted, and might perhaps never be, put the case on the ground of the fraud.

There is no fraud charged in this case, and the bill has no such ground to support it.

[* 523]

*If there be no fraud, and no covenants taken to secure the title, the purchaser has no remedy for his money, even on a failure of title. This is the settled rule at law; (*Frost v. Raymond*, 2 *Caines*, 188.) and I apprehend that the same rule prevails in equity. (1 *Fonb.* 366. note. *Urmston v. Pate*, cited in *Sugden's Law of Vendors*, 3d ed. 346, 347. and in 4 *Cruise's Dig.* 90. and in *Cooper's Eq. Rep.* 311.) In the case of *Hiern v. Mill*, (13 *Vesey*, 114.) the lord chancellor observed, that possession of land was no criterion of title, and that no person, in his senses, would take an offer of a purchase from a man, merely because he stood upon the ground. The purchaser must look to his title: 404

and if he did not, it would be *crassa negligentia*. 'I know of no case in which this Court has relieved the purchaser where there was no fraud and no eviction; all the cases that I have looked into proceed on the ground of a failure of the title duly ascertained. Thus, in the imperfect note of the case of *Picketon v. Litecote*, 22 *Eliz.* cited in 21 *Viner*, 541. pl. 1., and sometimes referred to, process was awarded by chancery to have the purchase money refunded; but in that case it appeared by the defendant's answer, that the plaintiff could not enjoy the reversion of the copyhold which he had purchased; and in the *anonymous* case, in 2 *Ch. Cas.* 19. there was a previous eviction under a paramount title; but the authority of that case is questioned, in a note to the case itself, and in the subsequent books, which refer to it; not, indeed, in respect to the necessity of a previous eviction, which the case may be considered as assuming, but on the ground that there was no covenant against paramount titles, and that the purchaser, as to them, took the conveyance at his peril. In *Serjeant Maynard's* case, (2 *Freeman's Rep.* 1.) referred to in the passage cited by the counsel from *Viner*, the lord chancellor said, that there being no fraud or surprise in the case, if the party was not aided by his covenants, he would not be helped in equity; and yet the purchase money had *been paid, and a third person had made title. There are some loose *dicta*, (for which I presume the case was referred to,) but they are without any fulness of illustration, and want that precision which is requisite to give much force to them. The decision in the case is strong against the pretension of the present plaintiff; for though a third person had made title, and the plaintiff had paid his purchase money, yet, in consequence of a positive agreement with the vendor, he was rigorously denied any relief, and left to his remedy, if any, at law. So again, in *Bingham v. Bingham*, (1 *Vesey*, 126.) on a bill to have purchase money refunded on a mistake in title, the mistake had appeared in an *ejectment at law*. It appears to me that this principle pervades the cases.

The only plausible argument for the injunction is, that as the plaintiff has covenants to secure his title, the interference of this Court is necessary to prevent circuitry of action, and that the plaintiff ought not to be compelled to pay the purchase money, when, by a suit on his covenants, he might, almost concurrently, be enabled to recover it back again. This argument would apply to every case of mutual and independent covenants, and would prove too much; but the proper answer here is, that to sustain the injunction would be assuming the fact of a failure of title before eviction,

1817.

ABBOTT
V.
ALLEN.

[* 524]

1817.

ABBOTT
V.
ALLEN.

[* 525]

or trial at law; and which this Court, as not possessing any direct jurisdiction over legal titles, is not bound or authorized to assume. This Court may, perhaps, try title to land when it arises incidentally; but it is understood not to be within its province, when the case depends on a simple legal title, and is brought up directly by the bill. The power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable interference. This was the doctrine laid down by the respondent's counsel, on appeal, in the case of *Welby v. Rutland*, (6 Bro. P. C. 575.) and it appears to have been sanctioned by the Court. The rule is now so understood, according *to a late treatise on the principles and practice of the Court of Chancery, (1 *Mad-dock's Chan.* 135.) a work of merit and utility. This point was also discussed much at large, and emphatically laid down by Baron Wood, and not denied by the other barons. in the case of the *Attorney-General to the Prince of Wales v. St. Aubin*, (1 *Wightwick's Exch. Rep.* 184 to 238.) The principle on which set-offs are allowed, is also inapplicable to such a case, where the demand of the one party is certain, and that of the other is not known, and cannot be ascertained, until the outstanding title, suggested to exist, has been established at law.

The plaintiff has the means of bringing the legal title to a test, whenever he pleases, by an action at law on his covenant of seisin.

It is unnecessary for me to say whether or not the injunction ought to stand, if there had been a previous eviction. or if there was an existing encumbrance which appeared to admit of no dispute. I give no opinion on either of those points, nor on a view of the case, if founded on other and special circumstances. It would be hazardous to undertake to define the limits of equitable relief, in other supposable cases of the like kind. But in this case, where the plaintiff now is, and for twelve years past has been, in the peaceable possession of the land, and when no adverse title is put forward by any person claiming it, nor any adverse proceeding threatened; and when we have nothing but defects of title speculatively set forth, and when the plaintiff has full covenants, to one of which he can immediately resort in the Courts of law, if the vendor was not seised, I feel myself bound to say, that the defendant's remedy at law, for the residue of his purchase money, ought not to be stayed, and that the injunction must be dissolved.

Injunction dissolved.

1817.

SKINNER
v.
DAYTON.

*SKINNER *against* DAYTON and others.

A Court of equity gives relief against a *penalty* or *forfeiture*, where the case admits of certain compensation; but not where the sums covenanted to be paid are in the nature of stipulated damages; but it will not interfere, unless the party can be clearly and fully indemnified, and placed in the same situation as if nothing had happened.

By an agreement, made in *April*, 1815, *A.* covenanted with *B.* and *C.* (directors and agents of a manufacturing company) to make certain machinery, in one year, at a certain price, to be paid in instalments; on the 1st of *August* following, *B.* and *C.* gave notice that the company could not go on, and that the contract was abandoned; and *A.* (the covenants being independent) brought an action at law against *B.* and *C.*, to recover the instalments due before the 1st of *August*. The Court refused to stay the suit at law, by injunction, until the amount of compensation justly due to *A.*, for the work he had done, could be ascertained by a master, or by an issue of *quantum damnificatus*; the plaintiff's right of action at law being clear and certain, and the amount of the instalments sued for appearing, from the answer of *A.*, not to exceed an adequate compensation for the materials found, and work done by him towards the fulfilment of his contract, on the 1st of *August*.

It seems, that one party alone cannot rescind a contract; and if *A.* had gone on, notwithstanding the notice from *B.* and *C.*, and completed the machinery, according to his contract, and tendered it to them, whether he would not be entitled to demand the full sum stipulated to be paid? *Quære.*

THE bill stated that the plaintiff, and *Abraham Dayton* *Reuben Wheeler*, *William Raymond, jun.*, *Nathan H. Raymond*, *Abner S. Hitchcock*, and *Nathan Dean*, defendants, and *Ira Hall*, on the 10th of *April*, 1815, formed an association, in writing, called *The Granville Cotton Manufacturing Company*, with a president, and from two to four directors; and that it was agreed, among other things, to be the duty of the president and directors, to appoint a *general agent*, to purchase stock and vend goods, and, under the direction of the president and directors, to do business; and that each person, at the time of subscribing, was to pay, on each share, 10 dollars, and, from time to time, such assessments as the president and directors should make, or forfeit his shares, &c. The stock was to be divided into 20 shares, which were taken by the plaintiff and the defendants above named, and by *J. White*, *R. Taylor*, and *M. White*, also defendants, who took two shares. The plaintiff was elected president, and two of the defendants, *W. R.* and *A. H.*, directors, and *N. R.*, treasurer.

On the 25th of *April*, 1815, an agreement was entered into between *White, Taylor & White*, and the plaintiff, as

August 28th

[* 527]

1817.

SKINNER
v.
DATTON.

agent and director, and with the approbation of the company, under the hands and seals of the parties, as follows: *W., T. & W.*, promise to make, and deliver at the factory, of the best materials and workmanship, 12 throssel frames, &c., (describing them,) to wit: six frames in the month of *October*, then next, and the six other frames on or before the 1st of *May*, 1816; and the plaintiff and *W. R.* and *A. H.*, as directors, engage in behalf of the company, to pay *W., T. & W.* 15 dollars for each spindle, or 15,120 dollars, as follows, viz.: 900 dollars in 35 days, and 500 dollars in every 30 days thereafter, until all the machinery is in full operation, at which time the balance due *W., T. & W.* shall be paid.

The bill stated, also, that the constitution of the association was made known to *W., T. & W.* before the execution of this agreement, and that they had agreed to become subscribers for two shares, on being so employed, but annexed a further condition, that they should be exempted from any assessment which had been, or should be made, until the machinery was furnished and the factory in operation, which was agreed to by the plaintiff; and that this offer to be stockholders was the inducement to the plaintiff to enter into the above agreement.

The directors had raised, by assessments, about 1,100 dollars, to pay for land purchased; and on the 27th of *April*, 1815, they laid another assessment, on 18 shares, of 50 dollars each; *A. D.*, *J. H.*, and *R. W.*, paid their assessments, amounting to 350 dollars, but all the other *stockholders refused to pay the assessments, and forfeited their shares, and all previous payments. The president and directors gave written notice to *White, Taylor & White*, that by reason of those forfeitures, the company could not go on, and the contract with *W., T. & W.* could not be performed. *N. R.*, who delivered the notice, was answered, that they had made no contract for machinery, but had done something towards the frames.

The bill further stated, that the plaintiff had been sued by *Clarke* and *Savage*, for stone for the building, which suit was still pending; that the sums raised by assessments amounted to 1,535 dollars; and 1,100 dollars was paid for land, 300 dollars for stone, and 110 dollars for mason work; and the plaintiff had paid out of his own funds 217 dollars and 94 cents. That *W., T. & W.* had not performed any part of their contract, and were insolvent. That *T.* had absconded. That one of the other partners was imprisoned for debt, and their partnership was dissolved. That in *August*, 1815, *W., T. & W.* brought an action, at law, against the plaintiff, for a breach of covenant contained in the above agreement; and

[* 528]

averred, in their declaration, the non-payment of the 900 dollars, which was payable in 35 days, the sum of 500 dollars, payable on the 29th of *June*, and 500 dollars, payable on the 29th of *July*, 1815. That the plaintiff pleaded to this action, that before the agreement, the defendants and *Hall*, and *W., T. & W.*, entered into the association aforesaid, and appointed *W. R. & A. H.* directors and agents, and that the plaintiff executed the agreement as *director and agent*, and in no other capacity; to which plea there was a demurrer, on which the Supreme Court gave judgment against the plaintiff, in *August*, 1816.† That on the 25th of *August*, 1815, the plaintiff gave notice to all the other partners of the pendency of that suit, but they did not interfere in defence of it, though the company were under equitable obligation to bear an equal proportion of the loss. That *Ira Hall* died intestate, on the 18th of *September*, 1816.

*The bill prayed that the defendants might be decreed to pay to the plaintiff 217 dollars and 94 cents, and such other sums as he was obliged to pay, and that the agreement with *W., T. & W.* might be delivered up to be cancelled; and that an injunction should be issued to stay the suit at law, which was accordingly issued.

Marvin White, in his *answer*, admitted the articles of association of the 10th of *April*, 1815, &c.; and stated that he, — *Taylor*, and *John White*, were partners, at *Troy*, in the business of making machinery for cotton manufactories. That on the 25th of *April*, 1815, in behalf of *W., T. & W.*, he executed the agreement above mentioned, with the plaintiff, and subscribed two shares to the company; but on the express condition that they, *W., T. & W.* should be exempt from any assessment which had, or should be made, until the factory was in operation. He denied that he agreed or expected to look to the members of the association for the performance of the agreement, but relied wholly on the liability and responsibility of the plaintiff. That in *May*, 1815, *N. H. R.* delivered him a letter from the plaintiff and the two directors, stating that several of the shares had become forfeited, and that the remaining stockholders would be obliged to abandon the business, unless some alteration was made in the contract; and that *Raymond* was authorized to agree to such alteration; but the defendant denied that the letter contained any notice that the company would not go on, or that the contract made by the plaintiff would not be performed. The defendant also denied that he told *R.* that they, *W., T. & W.*, had made no contracts for machinery, &c., but, on the contrary, he informed him, that they had provided materials for the machinery, and had contracted

1817.

SKINNER
V.
DAYTON.

†13 Johns. Rep.
307.

[* 529]

1817.

SKINNER
V.
DAYTON.

[* 530]

with a large number of workmen, by the year, to work on the machinery. That no proposals as to alterations were afterwards made by the plaintiff or others. That immediately after the contract, the defendant commenced the work on the machinery, and *continued the work until the first of *August*, when he received a letter from the plaintiff, dated the 24th of *July*, that convinced him that the plaintiff did not mean to perform the contract, which letter was the first notice *W., T. & W.* had, of the intention of the company not to go on with the manufactory, and which he considered as amounting to a notice of an abandonment of the contract by the plaintiff, and a refusal to perform it. That the wages of the workmen employed on the machinery to that time, amounted to 2,377 dollars and 34 cents; and the cost of the materials purchased, to 882 dollars, 66 cents. That when the letter was received, on the first of *August*, *W., T. & W.* were in good credit and solvent, and could have executed the contract, if the plaintiff had performed on his part; and that their subsequent insolvency was produced by the losses sustained in consequence of the failure of the plaintiff to perform his part of the contract. That the work and materials furnished, at the expense of 3,300 dollars, had become useless, and were not now worth 400 dollars, &c.

The answer of *John White* was, in substance, the same as that of *M. W.*

August 25th.

Buel, for the defendants, (*White, Taylor & White*,) now moved to dissolve the injunction staying the suit at law; and, also, that the costs of preparing the suit for trial at the last *October* circuit should be paid out of the money deposited by the plaintiff with the register.

He contended, that *W., T. & W.* were not bound to contribute, as they took the two shares on special terms. That they were entitled to their actual expenditures and losses, in consequence of the contract, which amounted to 3,260 dollars; and they made no unconscientious use of their action at law on the covenant, since they assigned breaches only to 1,900 dollars, or for the three first instalments, which were due and payable when they received notice of the abandonment of the contract from the plaintiff. That the *Supreme Court (13 *Johns. Rep.* 312.) had decided that the plaintiff was bound by the covenant in his individual capacity; and the plaintiff was responsible, whether his assumed agency was founded in fraud or mistake, (1 *Fonbl. Eq.* 292, 293. s. 17. *Id.* 296. n. b. 295. s. 18. 3 *Johns. Rep.* 591.) That the plaintiff, having prevented the performance of the contract, cannot set up the non-performance as a defence. (*Roll. Abr.* pl. 5. *Doug.* 634. 1 *Term Rep.* 410

[* 531]

645. 1 *Fonb. Equ.* 391. and *notes.*) That as the insolvency of the defendants was caused by the failure of the plaintiff to perform his part of the contract, he cannot make that an excuse for the non-performance of his covenant. [10 *Johns. Rep.* 203. 1 *Fonbl.* 294. n. (f.)] The plaintiff could not, by his *notice*, stop the defendants from proceeding in the work. One party cannot rescind a contract. But there was no notice until the 24th of *July*, when the contract had been performed by the defendants, to an amount exceeding the sum demanded in the suit at law. Hardship is no ground for rescinding a contract. (2 *Com. Dig.* ch. 4. D. 10. 2 *Vern.* 243. 1 *Ch. Cases*, 84. *Newland on Cont.* 357. 1 *Fonbl.* 126. n. b. *Reeve's Domest. Rel.* 401.) There was no sufficient notice of abandonment of the contract until that of the 24th of *July*; and if the business of the company had succeeded and been profitable, the defendants would have been made responsible, notwithstanding the pretended notice in *May*.

Again; this Court will not rescind the contract, unless the parties can be placed in *statu quo*. The defendants ought to be assured of an adequate compensation, and that can come only from the plaintiff.

Henry, contra, insisted, that *W., T. & W.* were, at the time of the contract, parties to the association; that it was not very credible that they looked to the plaintiff alone, but must have considered him as contracting, in his representative capacity, and binding the company, as their *agent. The authority of the plaintiff to contract, as *agent*, is no where explicitly denied in the answers, and the answers of co-defendants are not evidence for each other, against the plaintiff. The acts of the plaintiff were recognized and approved by the other members of the company; and this approbation is equivalent to an original authority. The defendants, *W., T. & W.*, contracted in reference to the fund, and were bound to contribute ratably. It is true, that hardship alone is not a sufficient ground for rescinding a contract; but here *W., T. & W.*, being members of the association, contracted on the faith of the *fund*, and when that failed, they were entitled to no more than *compensation*. On the principle contended for by the defendants, they might go on and recover of the plaintiff all the instalments mentioned in the contract. The covenants, he admitted, were independent; and the whole case resolved itself into a question of *quantum damnificatus*, which could be ascertained either by an issue directed by the Court, or by a reference to a master. But the form of the action at law wholly excluded that question. The

1817.

SKINNER
V.
DAYTON.

[* 532]

1817.

SKINNER
V.
DAYTON.

question of *indemnity* is not to be decided on the mere answers of the defendants, and the bill ought to be retained, for the purpose of ascertaining and settling the *compensation* to which the defendants may be entitled.

[* 533]

THE CHANCELLOR. The defendants contracted with the plaintiff in his individual capacity. This is the legal interpretation of the contract, as declared by the Supreme Court; and the two answers of the two *Whites* are explicit as to their intention so to contract. There is no doubt that the covenant of the plaintiff to pay the three instalments, for which the action at law was commenced, is an independent covenant, and there is nothing appearing in the case to show that the plaintiff is not held at law to perform it. What then is the equity which is to control that suit? It may be said, that *White, Taylor & White* were parties to the association, and, as such, bound to contribute ratably to all losses and charges. But I do not view the case in that light. They agreed to take two shares of the company stock, at the time the covenant was entered into with the plaintiff, but it was on the condition that they were to be exempted from any assessment which had or should be made, until the machinery was furnished, and the manufactory in operation. The manufactory never went into operation, and, therefore, the case never occurred in which they were to be called on for any assessment, or, in other words, for any contribution; and, as the contract was made with the plaintiff personally, and upon such condition, I do not perceive that he has any equitable claim upon them for a deduction of any portion of his loss from their demand, under the covenant. The taking two shares of the stock ought not, under the circumstances of the case, to have any effect upon the contract. But it may be said, that the defendants *W., T. & W.*, were duly informed of the failure of the funds and object of the association, and that they are entitled only to a just indemnity for their services and expenses at the time of the notice. Before we consider this point, it must first be ascertained when such notice was given. The bill charges, that notice, to that effect, was given in *May*; but this is denied in the answer, and the nature of the information given in *May* is set forth. The notice given in *May* by *Raymond*, accompanied with the explanations stated in the answer, was not sufficient to discharge the defendants from the execution of the contract on their part. It wanted precision and certainty, and the conversation with *Raymond* left it altogether indefinite. The only notice on which the defendants could, upon any colorable grounds, stay the further performance of the contract, was the one received on the 1st of *August*.

Whether the plaintiff could, under any circumstances, without the assent of the opposite party, rescind or suspend the contract, is a point I need not now discuss. It appears, that the contract was, in fact, suspended, from and after the 1st of *August*, by notice from the plaintiff, and acquiescence on the part of the defendants, in the future discontinuance of the work. The suit at law is only for the instalments *then due*, and I do not perceive any clear and decided equity against the recovery of those instalments. The defendants, in their answers, aver actual damages, in consequence of the part performance and subsequent interruption of the contract, far beyond the amount of the instalments sued for, and there is nothing in the case to contradict the averment. The defendants have a title at law to the moneys due on the 1st of *August*, and the failure of the contract did not arise from any default in them. It was the act of the plaintiff, and it does not appear, affirmatively, to be inequitable or unjust, that the defendants should recover the instalments sued for. A legal right ought not to be interrupted, without some certain equity set up against it. I should think there ought to be something more than conjecture, that the 1,900 dollars due at law, exceed an adequate compensation.

If *W., T. & W.* had disregarded the notice, and gone on, and completed the machinery, according to the covenant, I am not prepared to say they would not have been entitled to have tendered the result of their labor, and demanded the entire sum of 15,120 dollars. I am inclined to think it is not in the power of one party alone to rescind a contract. This seems, indeed, to be permitted under the *French* law; (*Pothier, Traité du Contrat de Louage*, § 440—443.) but the language of the *English* judges is different. (*Smith v. Field*, 5 *Term*, 402.) As the defendants discontinued their work after the receipt of the notice, they are entitled, in equity, to a just compensation for the services they had *previously* rendered, and the moneys expended, and the injuries sustained under the contract. It is urged, however, that the amount of the compensation ought not to be taken from the answers, but ought to be accurately ascertained by a reference, or an issue of *quantum damnificatus*, as it may possibly fall short of the 1,900 dollars, which the defendants are seeking to recover at law. I have felt all the weight due to this consideration, but it appears to me not to be discreet to interfere with the clear, certain claim of the defendants at law, in pursuit of a point of such uncertainty and speculation.

It is, no doubt, a general principle of the Court, that equity will relieve where a penalty is forfeited, if the case admits of a certain compensation; and the true foundation of the

1817.

SKINNER

V.

DATTON.

[* 534]

[* 535]

1817.

SKINNER
V.
DAYTON.

relief is, that when penalties are designed only to secure money or damages really incurred, if the party obtains his money or damages, he gets all that he expected or required. In the cases of *Sanders v. Pope*, and *Davis v. West*, (12 Vesey, 282. 475.) it was admitted, upon the strength of a series of authorities, that where covenants are broken, and there was no fraud, and the party capable of giving complete compensation, equity would relieve against a *forfeiture* for a breach of other covenants than those for non-payment of rent. It is still, however, in all the cases, a *forfeiture*, or *penalty*, which is in question. But the instalments in this case were not in the nature of penalties, and the exaction of them is not the exaction of a forfeiture. They were intended as payments for equivalent services rendered, and expenses incurred, *pari passu*, with the accruing instalments. They were not, by any means, equivalent to the progress of the work, for the machinery was to be completed in one year, and the instalments payable within that time, under the contract, did not amount to a moiety of the stipulated compensation. The bill does not charge any default in the defendants. That is not the ground of the bill. I have a right to presume that the defendants were engaged in the actual and faithful execution of the contract on their part, when they were arrested by the notice. The answers declare, explicitly, that fact, and the presumption arising out of the terms of the contract itself, is, that the compensation justly due the defendants is, at least, commensurate with the instalments claimed.

[* 536]

If the suit at law was for instalments payable after the 1st of August, and when the defendants had discontinued their labor and services, the case would present another and different aspect. But I am here called upon to interrupt the assertion of a legal right, upon the mere possibility of an existing equity against a part of the claim; and I do not think, as the case stands, that such an interruption would be a fit and discreet exercise of jurisdiction. "There is no branch of the jurisdiction of this Court," says Lord Eldon, in *Sanders v. Pope*, "more delicate, than that which goes to restrain the exercise of a legal right. That jurisdiction rests only upon this principle; that one party is taking advantage of a *forfeiture*." But the present case is not one in which the forfeiture is exacted. The instalments are more in the nature of stipulated damages, and it is settled that equity will not relieve against them. (*Woodward v. Gyles*, 2 Vern. 119. *Rolf v. Peterson*, 6 Bro. P. C. 470.) In all the cases in which the Court does interfere with the legal right, it must appear clearly, that full compensation can be made so

as to render the party perfectly secure and indemnified, and place him in the same situation as if the occurrence had not happened. This is the doctrine laid down in *Sanders v. Pope*, and it is there admitted that the interference of the Court depends on discretion. I am not very certain that the injury to the defendants by the failure of so great an undertaking, after it had been in a course of performance, is susceptible of clear and definite compensation. There may be consequential damages arising from the loss of other business, which this undertaking dismissed, not easy to be reduced to calculation; and, as the defendants are not in the wrong, and have done nothing that did not arise from their legal rights; and as I am inclined *to believe, from the contract itself, and from the answers, that their damages are, at least, equal to the instalments claimed, there is no sufficient ground on which I can interfere with their suit at law.

I am, accordingly, of opinion, that the motion to dissolve the injunction be granted, and that the costs and expenses incurred in preparing the suit of law for trial, in *October* last, be paid, after they shall have been duly taxed, out of the moneys deposited by the plaintiff with the register.

Rule accordingly.

415

1817.

SKINNER
v.
DAYTON.

[* 537]

1817.

LIVINGSTON
v.
LIVINGSTON.

D. LIVINGSTON *against* M. & E. LIVINGSTON.

A husband and wife may contract, for a *bona fide* and valuable consideration, for a transfer of property from him to her.

Where husband and wife agreed, by *parol*, that he should purchase a lot in her name, and build a house thereon, and that he should be reimbursed the cost thereof out of the proceeds of another house and lot of which she was seised, which should be sold for that purpose; and the husband having executed the agreement on his part, the contract failed by the sudden death of the wife, who left infant children, to whom the legal estate in both lots descended; the agreement was decreed to be carried into effect, and the lot was ordered to be sold, and a conveyance executed by the infant trustees, by their guardian *ad litem*; and their father, (the plaintiff,) and the master, were directed to join in the conveyance; and the plaintiff to be reimbursed his advances, out of the moneys arising from the sale.

Though such conveyance by the husband to the wife is presumed, in the first instance, to be intended as an advancement and provision for her, yet that presumption may be rebutted by *parol* proof.

A resulting trust is within the statute, (Sess. 24. ch. 30. s. 7. 1 *N. R. L.* 147.) and an infant may be decreed to convey such trust, it being established by *parol* proof.

† 7 Ann, c. 91.

September 2d.

[* 538]

THE plaintiff, in May, 1809, married *Eliza Oothout*, who was seised in fee, in her own right, of a house and lot (No. 56) in *Greenwich* street. After the marriage, the plaintiff expended 2,500 dollars in repairs and improvements on the *house. In April, 1814, the plaintiff and his wife agreed that he should purchase, in her name, another lot, and build a house thereon, and that the cost of erecting such new house should be paid out of the proceeds of the house and lot first mentioned, on a sale thereof for that purpose, to be made when the new house was completed. The bill stated, that in pursuance of this agreement, the plaintiff, in May, 1814, purchased a lot (No. 51) in *Greenwich* street, for 6,000 dollars, which he paid out of his own money, and took a deed in his wife's name; that he erected a house on the lot, in the building of which he expended above 16,000 dollars of his own money. That in September, 1815, he and his wife went to reside in the new house, and his wife, soon after, on the 21st day of the same month, died suddenly, while the plaintiff, with her concurrence, was in treaty for the sale of the first house and lot. That the wife of the plaintiff left two infant children, her heirs, and to whom the legal estate in both houses and lots descended. The plaintiff alleged, that the consideration for the agreement between him and his wife, having thus failed, he was entitled to avoid the agreement, and consider the children as trustees for the plain-

tiff, in regard to the second house and lot. The bill prayed that the defendants might be decreed to release the last-mentioned house and lot to him, or that the same might be sold, and he be reimbursed the moneys he had so advanced, out of the proceeds of such sale.

The defendants, being infants, put in their answer by a clerk of the Court, as their guardian *ad litem*, and admitted only the seisin of their mother in the first lot, and her death.

The plaintiff proved the material facts stated in the bill.

T. L. Ogden, for the plaintiff.

*THE CHANCELLOR. I entertain no doubt of the fairness and equity of the agreement between the plaintiff and his late wife, as stated in the bill, and proved by one of the witnesses. A husband and wife may contract, for a *bona fide* and valuable consideration, for a transfer of property from him to her. It was admitted as a clear point in the case of *Lady Arundell v. Phipps*, (10 *Vesey*, 146—149.) that a married woman, having separate property, may purchase, by the sale of it, other property, even of her husband, and have it limited to her separate use. Other authorities to the same point are referred to by *Atherly*, (*Treatise on Marriage Settlements*, p. 160, 161.) who considers the point supported by reason as well as by authority. Though the agreement here was by parol, yet it was carried into effect on the part of the plaintiff, and he has the clearest equity either to have the house and lot first mentioned sold, and the proceeds, or a part of them, paid over to him, or to have the second house and lot conveyed to him, on the ground of a failure of the contract by the sudden death of his wife. If there had been no issue between them, the hardship to the plaintiff would have been more striking, in suffering the property in both lots to pass immediately to the wife's collateral relations, but the principle of equity would not have been different. The circumstance, that the heirs of the wife are the children of the plaintiff, only gives a graver and more interesting character to the case. The presumption would undoubtedly be, in the first instance, that the conveyance to the wife was intended as an advancement and provision for her. This presumption was admitted in the case of *Kingsdon v. Bridges*, (2 *Vern.* 67.) but I do not see why it may not be rebutted, as has been done in this case, by parol proof. In *Finch v. Finch*, (15 *Vesey*, 43.) it was held, that though, when a purchase is made in the name of a person who does not pay the purchase money, the party paying it is considered in equity as entitled, yet if the person whose

1817.

LIVINGSTON
V.
LIVINGSTON.

[* 539]

1817.

LIVINGSTON
v.
LIVINGSTON.

† Sess. 37. ch.
108.

*name is used be a child of the purchaser, it is, *prima facie*, an advancement, but that it was competent for the father to show, by proof, that he did not intend advancement, but used the name of his child only as a trustee. If the agreement had here been for an exchange of lots, I might thus have ordered the infant heirs of the wife to convey to the plaintiff the house and lot first mentioned, considering them as infant trustees, according to the case of *Smith v. Hibbard*. (*Dickens*, 730.) But the agreement was, that the first house and lot should be sold, and the plaintiff reimbursed out of the proceeds for "the expense of erecting such new houses. This is the agreement as stated in the bill. I presume I have power to carry this partly-executed agreement into effect. under the 3d section of the act of the 9th of April, 1814,† entitled, "an act concerning infants;" and it appears to me that it would be more beneficial to the infants to have this agreement specifically executed, than to have the new house and lot conveyed to the plaintiff. It must be observed, that upon the terms of the agreement, as stated by the plaintiff, he is only entitled to be paid, out of the first house and lot, *the expense of erecting the new house*, and which, according to the testimony of the mason who built it, was about 11,000 dollars, though, according to the carpenter's testimony, the whole expense was upwards of 12,000.

The prayer in the bill is, that the infants may be decreed to convey to the plaintiff the house and lot last mentioned. or that *the said house and lot* may be sold. Strictly considered, the prayer is to have *the last* house and lot sold; and as there is no prayer for general relief, but only this specific prayer, I am the more particular in this criticism on the bill. I am content, however, to consider the prayer for a sale as alluding to the first house and lot, and I presume it was so understood, for the plaintiff has no pretext of right to have the last house and lot sold. The question, then, is fairly before me, which course ought to be pursued. *If the release is to be adopted, it must be on the ground, that the contract has failed, and that the infants hold the second house and lot for the plaintiff as a resulting trust, he having paid the purchase money. Infants have been ordered to convey a resulting trust after it was established by parol testimony: and it has been held by Lord Chancellor King, (*ex parte Vernon*, 2 P. Wms. 548.) to be a trust within the statute of 7 Ann, c. 19. which we have adopted, relative to conveyances by infant trustees. It was, however, afterwards doubted by Lord Talbot, in *Goodwyn v. Lister*, (3 P. Wms. 386.) whether constructive trusts were within the statute of 7 Ann, though he gave leave to the plaintiff to apply, in case

[* 541]

any precedents could be found where such constructive trusts had ever been held to be within the statute. Lord Talbot, in that case, must have either considered a resulting trust not one of the constructive trusts to which he alluded, or he must not have known or recollected the decision of Lord King, and which, I think, ought to be considered as an authority. My difficulty is not as to a want of jurisdiction in case a resulting trust be established; but I think that a strict performance of the contract would be just, as it respects the plaintiff, and more beneficial to the infants, and, therefore, it is the more advisable remedy.

I shall, accordingly, decree a sale of the house and lot first mentioned, under the direction of a master; that the sale be at auction, on due public notice, and the terms of it be reduced to writing, and the *memorandum* of it signed by the purchaser, and reported to the Court for its approbation; and that, when confirmed, the conveyance be executed by the infants, by their guardian; that the plaintiff and the master unite in the conveyance; that the moneys be brought into Court to abide its further order; that the same master ascertain and report the amount of the expense of the plaintiff in erecting the house on the last lot, and that the depositions taken in the *cause be used by him as evidence, together with such other and further testimony as the plaintiff may think proper to furnish, and that he report such further testimony, together with his opinion, as to the amount of such expense.

Decree accordingly. (a)

(a) It was said, in *Prec. in Ch.* 284., that infant trustees convey by guardian after the conveyance is settled by a master, and in 10 *Vesey*, 554. the whole costs were charged on the party applying to have infant trustees convey.

1817.

LIVINGSTON
V.
LIVINGSTON.

[* 542]

1817.

GARR
v.
DRAKE.

GARR and others *against* DRAKE and GARR.

Where a suit is instituted in behalf of an infant, by a *prochein ami*, the Court, on suggestion of its being improperly instituted, will refer it to a master to inquire into the circumstances, and report whether the suit is for the benefit of the infant.

September 8th.

MOTION by the infant, by the defendant *Garr*, as her guardian, that her name be struck out of the bill, or that the suit, as to her, be staid until she come of age; on petition and affidavit of the infant, that she is nearly 17 years of age, and lives with the defendant, her guardian, and that the suit has been commenced without her knowledge, and that she believed it groundless.

Garr, (defendant,) for the motion.

Burr, contra.

[* 543]

THE CHANCELLOR directed a reference to a master, to look into the papers accompanying the motion, and to inquire into the circumstances of the case, so far as to be *able to form and certify an opinion whether the suit, instituted in the name of the infant, be for her benefit; and to report, &c. (*Cooper's Eq. Pl.* p. 28.)

Order accordingly.

1817.

JAQUES
v.
METHO. EPIS.
CHURCH.

JAQUES and others *against* THE METHODIST EPISCOPAL CHURCH and others.

Where numerous exceptions were taken to a master's report, and the facts multiplied, and the defendant applied for an order on the master to furnish *certified copies of the minutes and testimony* taken in the case before a former master, since deceased, and before himself, as the same were in his possession, and of *all notes and memorandums* made upon the testimony by the masters, and all the *vouchers* produced in evidence before them, relative to the matters of charge and discharge in taking the account; the Court, on account of the difficulty of specifying the particular parts of the testimony wanted, granted the motion; with the condition that the *expense* of returning such parts of the testimony as should not be found necessary to support the exceptions, should, in any event, be paid by the defendant.

MOTION on the part of the defendant, for an order that the master (*Francis Arden*) furnish *certified copies of the minutes of testimony* taken in this cause before the late master, (*F. Ball*), and before himself, as the same are now in his possession; and *all notes and memorandums made upon the said testimony by them*, and also the *several vouchers* produced and offered in evidence before him, in relation to the several matters of charge and discharge, on the taking of the said accounts. September 8th.

The following documents were read on the motion:

1. The *certificate of F. Arden*, the master, that he had in his possession the *written minutes or entries* made by the late master, *F. Ball*, containing the testimony of all the witnesses examined before him, and also the *written *minutes or entries* of the testimony of all the witnesses examined before himself.

[* 544]

2. The *petition of the defendant, John D. Jaques*, stating, that by an order of the 27th of June, 1815, certain accounts were directed to be taken between the plaintiffs and him. That *F. Ball*, a master, under that order, took the testimony of divers witnesses, and minutes thereof, and decided upon most of the charges made by the plaintiffs against the defendant, and of the discharges offered by the defendant relating to the same accounts, and made *memoranda* of his decisions, but died before completing the accounts, and making his report. That it was then referred to another master to complete the said account, and report thereon, and he was ordered to adopt the decisions of the former master, relative to the several items of charges and discharges, so far as he could ascertain the same from the papers left by the former

1817.

JAQUES
v.
METHO. EPISC.
CHURCH.

master, without any re-examination of the witnesses or documents; and that the testimony taken as to any item undecided, should be so far received, with liberty to take further testimony relative thereto; and that the executors of *F. B.* should deliver to the succeeding master, all books, papers, accounts, &c. with the minutes, &c. in relation to the matters and accounts so before him. That the executors executed the said order. That *F. B.* had made very full and careful minutes of all the testimony taken before him, and which passed into the hands of his successor. That *F. A.* adopted the decisions of *F. B.* relative to the several items of charges and discharges, as far as he could ascertain the same without re-examining the witnesses or documents relative thereto. That he also used his testimony as far as it was taken relative to undecided items. That the additional testimony taken by *F. A.* was carefully reduced to writing. That *F. A.* filed his report on the 10th of *April* last, to which the defendant has duly filed divers exceptions. That to understand the force and justness of the exceptions, it is necessary *to have the said testimony and vouchers. That most of the exceptions were taken in the belief that the masters reported contrary to evidence, or to the weight of evidence, and in some cases without sufficient evidence. That though some of the same testimony may not be relevant to the matters excepted to, yet the amount of such portion of it is comparatively small, and its production will not materially increase the expense, and he thought it would not be right in him to designate any part of the testimony, or vouchers, as proper to be suppressed. That he considered the testimony of fifty-one witnesses (whom he named) to be of primary importance for the due consideration of the exceptions, &c. The petition was supported by the affidavit of the petitioner.

[* 545]

3. The master's report; and,

4. The exceptions thereto, being eighteen in number.

Emmet, for the motion. He asked for all the evidence, from the extreme difficulty of discrimination.

Riggs, contra, objected, on the ground that the order ought not to be, generally, for all the evidence taken, but that it ought to specify the testimony requisite to support each particular exception. That, otherwise, much useless matter might be produced, and much useless expense created.

THE CHANCELLOR. From the multiplicity of facts to which the exceptions relate, I perceive at once the difficulty

422

of specifying the particular parts of the testimony wanted. Such a specification would lead to great detail, and probably to some confusion. Applications of this kind cannot be reduced to any precise rule, and there must be a discretion to be exercised. Here the testimony is all carefully reduced to writing, and a great part of it, and probably all the material part, is wanted. It will, therefore, be *the most advisable course to let all the testimony come up; but the defendant should pay for the expense of that part which shall not be found to be necessary; and he should bear that expense whether he eventually succeeds or not, with his exceptions. This course will prevent all abuse in such general applications. The motion is, accordingly, granted, with this proviso, that the expense of returning such parts of the testimony as shall not be found necessary in support of the exceptions, or any of them, shall, in every event, be borne by the defendant.

Rule accordingly.

1817.

JOHNSON
v.
GERE.

[* 546]

JOHNSON and others *against* GERE.

Where the vendee gave a bond and mortgage, to secure the purchase money, and an action of ejectment was afterwards brought against him, by a person claiming a paramount title, and the vendor brought a suit on the bond, and advertised the premises for sale, under a power contained in the mortgage, the proceedings on the bond and mortgage were ordered to be stayed, until the action of ejectment against the vendee was determined, and the further order of the Court.

THE bill stated, that the defendant and *John M. Pierson* were seised in fee, as tenants in common, of four acres of land, in the village of *Ithica*. That *Pierson* died; and, by will, devised his property to his wife *Amelia*, and made her and two others his executors. That she and the defendant made partition of the land, and the east part, or two and a half acres, was released by her to the defendant, and the residue released by him to her. That the defendant, *afterwards, made valuable improvements on his part, and sold them by deed, with full covenants, to *Elnathan Andrews*, for 8,000 dollars, of which 4,000 dollars were paid, and the residue, payable by instalments, was secured by bond and mortgage, of which 2,500 dollars thereof was still due. That the widow has since died; and *E. Andrews* had also died without issue,

[* 547]

1817.

JOHNSON
V.
GERE.

and the plaintiffs *Johnson* and *Andrews* were his administrators. That *Bela Andrews*, father and heir of *Elnathan Andrews*, had sold the two and a half acres to the plaintiffs *Champlin* and *Frisbie*. That the guardian of the infant children of *John M. Pierson* asserts, that the widow had only a life estate by the will, and that the partition is void and not binding on them; and had commenced an action of ejectment at law, on the demise of the two infants, against the tenant of the plaintiffs *C.* and *F.*, for the recovery of an undivided moiety of the two and a half acres. That the defendant has prosecuted at law on the bond, for the residue of the moneys due thereon, and is also advertising the mortgaged premises for sale, by virtue of a power in the mortgage. The bill prayed for an injunction to stay the prosecution on the bond and mortgage, until answer and the further order of the Court.

E. Miller, for the plaintiffs.

THE CHANCELLOR granted the injunction, and distinguished this case from those wherein there was only an allegation of an outstanding title, and no disturbance, prosecution, or eviction thereon. Here, he said, the party was actually prosecuted by an action of ejectment, on the ground that the title derived from the defendant was defective. The defendant is entitled, and it will be his duty to defend the ejectment suit; and until that suit is disposed of, he ought not to recover the remaining moneys due on the bond.

[* 548]

Injunction granted.

1817.

MOODY
v.
PAYNE.

MOODY *against* A. and H. PAYNE.

The interest of one partner in the partnership property, may be taken and sold, under an execution at law, in a judgment against such partner, for his separate debt; and equity will not stop such execution or sale, by injunction, until the partnership accounts are taken and liquidated.

HENRY, for the defendants, moved to dissolve the injunction which had been issued in this cause, on the ground that the answer denied all the equity of the bill. September 22d.

The bill was for an account of the partnership concern, after a dissolution, and to enforce a sale at law, under a judgment confessed by *H. Payne*, one of the partners, after the dissolution, for his separate debt, due the other defendant, *A. Payne*, and under which judgment partnership property had been seized. The bill stated a number of existing debts against the copartnership, and its insolvency.

The answer denied the insolvency, and some of the partnership debts, and admitted others.

Van Buren, (attorney-general,) contra, contended, that partnership effects could not be sold on execution at law, for a separate debt of one partner, after a bill filed for a partnership account; for the creditor, he said, was only entitled to the share of such partner, after the partnership accounts were taken and settled, and that the injunction was *and ought to be continued. He cited 4 *Ves.* 396. 11 *Vesey*, 85. 17 *Vesey*, 209. 1 *Madd. Ch.* 112.

[* 549]

THE CHANCELLOR. It is true, the execution at law only takes the interest of the partner who is sued, subject to the partnership debts; and there are difficulties in selling such an uncertain interest, before it is ascertained, by taking and stating the accounts in this Court, what is the interest to be sold. Lord *Eldon*, in *Waters v. Taylor*, (2 *Vesey & Beame*, 301.) felt the weight of that difficulty, but still he seemed to admit, that a Court of law might, in the mean time, go on and sell, and that this was the constant practice. I do not know that this Court has ever undertaken to stop an execution at law, in such a case, until the partnership accounts have been taken, and it would be too much for me to assume it without precedent. The principle would go to stay executions at law, in every case, against the partnership prop-

1817.

MOODY
v.
PAYNE.

erty of one partner, who owed separate debts, until the disclosure and liquidation of the concerns of the copartnership. This would produce inconceivable delay and embarrassment, in respect to the separate creditors. If those creditors can sell only subject to the joint creditors, there is no harm in suffering them to go on at law; and if any sacrifice of the interest of the separate partner is made, by reason of the uncertainty, it affects only that partner, who does not here raise the objection. The late exchequer case of *The King v. Sanderson*, (1 *Wightwick Ex. Rep.* 50.) admitted, that upon an *extent* against one partner, the crown, like a separate private creditor, took the separate interest of the partner, subject to the partnership debts; and that it was the practice for subjects to issue executions against the interest of one partner, and that the sheriff sold only the interest of such partner, and not the effects themselves. The cases referred to by Mr. *Maddock*, do not warrant his conclusion, that chancery stops such executions by injunction. It is evident *that the Courts of law are in the constant practice of awarding execution in such cases, and that this Court does not, ordinarily, and upon such general grounds, enjoin the sale at law.

[*550]

Injunction dissolved.

1817.

KIRK
v.
HODGSON.

KIRK *against* HODGSON and others.

A defendant who appears to have no interest in the cause, but is made a party *pro forma* only, may be examined as a *witness* for his co-defendant, notwithstanding the plaintiff has filed a replication to the answer of such defendant.

B. ROBINSON, on the part of the defendant H. Hodgson, *September 22d.* moved for an order to examine the defendants *Eastburn* and *Downes*, as witnesses for him. He contended, that it appeared from the pleadings, that they were not interested, and were made defendants, *pro forma*. He cited 1 *P. Wms.* 596. 1 *Johns. Ch. Rep.* 246, 247.

Emmet, contra, objected, on the ground that a replication had been filed to the answers of *Eastburn* and *Downes*. He cited 2 *Madd. Ch.* 316., in which it is said, that if the answer of a defendant be replied to, he is considered as interested, and cannot be examined.

THE CHANCELLOR said, he thought the mere fact of filing a replication was not sufficient to prevent the examination of a co-defendant, who appeared by the pleadings not to be interested in the cause. The *dictum* in *Maddock* was without reference to any authority to support it. If the filing a replication, was, of itself, decisive proof of interest, it would be in the power of the plaintiff to deprive a defendant of any witness. The rule to examine these *co-defendants must be granted, *subject to all just exceptions*; and if it should appear on the hearing that the co-defendants were interested, their depositions would, of course, be suppressed. [* 551]

Rule accordingly.
427

1817.

TODD
v.
BARLOW.

TODD *against* BARLOW.

Where there is no charge of corruption or misconduct in arbitrators, and their award, on the face of it, is final, nothing *dehors* the award can be pleaded, or given in evidence, to invalidate it.

An award will not be opened or set aside, on the allegation of the discovery of a receipt which had been lost or mislaid, so that it could not be produced before the arbitrators to show a payment, unless under very special circumstances, and satisfactory proof of all due efforts to discover the receipt before the hearing, or to supply its loss, and of its discovery since the award. If there is no charge or corruption, partiality, or undue practice in the arbitrators, an award will not be set aside, however unreasonable or unjust it may be.

September 30th.

BILL for a discovery and account, and for an injunction to restrain the defendant from proceeding at law on an award, &c. The grounds stated, were, 1. That the award was not *final*, because the arbitrators, at the time of executing their award, reserved the question as to a certain note of 375 dollars and 40 cents, and refused to make up their award, unless the defendant agreed that in case the plaintiff, in 90 days, should produce proof to the arbitrators of the payment of the note to *W. B.*, deceased, in his lifetime, and had applied it to his own use, he would deduct the same from the amount of the award, &c.

2. That the award was partial and unjust, &c.

3. That the plaintiff was not able to prove, before the arbitrators, a payment of 910 dollars, because a *receipt* for the same was accidentally lost or mislaid, and could not then be found, and was not exhibited to the arbitrators.

[* 552]

**Pendleton*, for the plaintiff.

Baldwin, contra.

THE CHANCELLOR. Neither of the grounds taken by the plaintiff's counsel upon the argument are sufficient to entitle him to relief against the award.

1. There is no charge of corruption, partiality, or undue practice in the arbitrators. But it is alleged that the award is not final, inasmuch as one of the arbitrators states, in his testimony, "that the arbitrators did make their award, upon the matters submitted to them, absolute, reserving for their future determination a question relating to a certain note made by *Allen & Howard*;" and inasmuch as *Barlow*, one of the defendants, on the day of the date of the award,

gave the plaintiff a certificate, that he might, within ninety days, produce satisfactory proof to the arbitrators, that 375 dollars, 40 cents were paid to *William Barlow*, deceased, and applied to his own use, on a note of *Allen & Howard*, and that on a certificate of the arbitrators that such proof had been furnished, he would allow it on the award.

The arbitrators never gave any such certificate, and such satisfactory proof was never furnished. The assertion, that it had been furnished, though made in the bill, is denied in the answers, and unsupported by proof. But the award itself, under the hands and seals of all the arbitrators, and bearing date on the 20th of *March*, 1807, contains no such reservation; and any understanding of that kind, *dehors* the award, is inadmissible evidence, and cannot be set up against it. This was the very point decided in the Supreme Court in this same case, and I consider that decision as conclusive upon the point. (*Barlow v. Todd*, 3 *Johns. Rep.* 367.)

2. The merits of the award cannot be re-investigated, on the ground that it was contrary to the weight of evidence. *There would be no end of litigation, if the accounts of parties were to be re-examined in this Court, on the suggestion of mistakes: it will be sufficient for me to refer to the case of *Underhill v. Van Cortlandt*,† in which this question has been fully examined. But the bill alleges the discovery of a receipt of *William Barlow*, since the award, for 210 dollars, 26 cents, bearing date the 9th of *June*, 1804. There is proof that the name of *William Barlow*, subscribed to that receipt, is of his hand-writing, but there is no proof of the time and circumstances attending the loss or the discovery; and it is an opinion to which I incline, that no verdict, judgment, award, or decree, ought to be set aside, and the controversy opened afresh, without something more than the mere simple allegation of a discovery and production of a receipt. In *Marriot v. Hampton*, (7 *Term Rep.* 269.) the Court of K. B. would not sustain an action for money had and received, on the ground of a discovery, since the trial, of a receipt for the payment of the very demand recovered at law. The Court considered that such a precedent would be mischievous, by encouraging negligence in preparing for trial, and by perpetuating litigation. The principle of that decision, though hard in its application, is founded in sound policy, and is best calculated to secure the peace and promote the interest and happiness of society. But if this rule be susceptible, in certain cases, of relaxation, and there are *dicta* to this effect, referred to in *Smith v. Lowry*, (1 *Johns. Ch. Rep.* 320.) yet the plaintiff, to entitle himself to any indulgence, ought, at least, to furnish very satisfactory proof of efforts made before

1817.

TODD
V.
BARLOW.

[* 553]

† *Ante*, p. 33.

1817. -

Todd
v.
Barlow.

the hearing, to discover the receipt, or to supply its loss, and of the clear and certain fact of its discovery since. He ought not to rest, as he does here, upon his own assertion, without any proof of loss, search, or discovery, except what arises from the non-production of the paper before the arbitrators, and of its production now.

[* 554]

*The receipt refers to no particular transaction: it is a naked receipt for so much money, and we have no other proof concerning it, than that of the hand-writing of the name of *William Barlow* subscribed. The counsel for the defendants insists, that it appears, from the inspection of the paper itself, that it originally bore date in 1801, which was prior to the accounts in controversy. I do not attach importance to this suggestion, though the appearance of the receipt might have some influence upon the judgment, if the case rested in mere discretion. But I proceed upon the general principle, and the want of special circumstances to take this case out of it. It does not appear by the bill, that the plaintiff even claimed payment before the arbitrators, of the moneys mentioned in the receipt. He says, *he did not recollect that he had such a receipt*. Surely an award is not to be opened, to help such carelessness in preparation, such forgetfulness of one's own rights!

I am, accordingly, of opinion, that the injunction, staying the suit at law, be dissolved, and the bill dismissed, with costs.

1817.

KING

v.

BALDWIN.

KING *against* BALDWIN and FOWLER.

Mere delay of the creditor to call on the principal debtor for payment, will not discharge the surety.

But if the creditor, by express agreement with the principal, varies the terms of the contract, by enlarging the time of performance, without assent of the surety, the latter is discharged.

A surety, on paying the debt, is entitled to stand in the place of the creditor, and to be subrogated to all his rights against the principal.

The rules for the relief of a surety are the same at law as in equity, when the facts are the same in both Courts. And where a surety, who has been sued at law, makes his defence, which is overruled as insufficient, he cannot, afterwards, on the same facts only, obtain relief in equity.

THE defendant *Fowler* being indebted to the defendant *Baldwin*, on the 10th of *October*, 1806, in the sum of *332 dollars and 89 cents, he, together with the plaintiff, as *his security*, executed a promissory note for that sum to *Baldwin*, payable on demand, with interest. In 1809, *F.* obtained his discharge under the insolvent act, and, in 1812, *B.* brought an action, on the note, against the plaintiff, who pleaded the general issue, and gave notice that he should prove, at the trial, that the debt, for which the note was given, was due from *F.* to *B.*, and that the plaintiff was merely surety; that *F.* was solvent and responsible long after the note was given; that the plaintiff informed *B.* of the failing circumstances of *F.*, and urged him to collect the money of *F.*, which *B.* refused to do. This special ground of defence was overruled by the judge, before whom the cause was tried, and a verdict was found for *B.* against the plaintiff *K.* for 459 dollars, on which judgment was rendered. The bill stated that the plaintiff consented to be security for *F.* for one year only; and that *B.* received money from *F.* for forbearance; and that part of the sum included in the note was not due from *F.* to *B.*; but these facts were denied by *B.* and *F.*, in their answers; and the depositions did not substantiate the allegations of the plaintiff.

It was proved that the plaintiff had frequently urged *B.* to sue *F.*, and that *B.* said he believed *F.* was an honest man, and he would not trouble him; that he would as soon lose his debt as prosecute him for it.

Burr, from the plaintiff, contended, that there was evidence of such neglect and refusal by *B.* to take any measures to collect the money of *F.*, or such collusion with him, as would discharge the plaintiff from his liability, as *surety*

[* 555]

1817.

KING

V.

BALDWIN.

[* 556]

of *F.* That *B.* was bound to use diligence to obtain payment of the note from *F.*, especially after application to him, for that purpose, by the plaintiff; and that giving time to the principal debtor, discharged the surety; *as the creditor had no right to increase the risk of the surety without his consent. He cited 2 *Bro. C. Rep.* 579. 2 *Vesey, jun.* 540. 544. *Tothill's Rep.* 280. *Nelson's Ch. Rep.* 9. 3 *Aik.* 91. 10 *East, Rep.* 34. 38. 14 *Vesey, Rep.* 168. 170. 20 *Viner, Ab.* 104. *Kirby's Rep.* 397.

D. B. Ogden, contra, insisted, that there was no general principle in law or equity, that the mere delay of the creditor to sue the principal debtor would discharge the surety. The equity of each case must very much depend on its special circumstances. That the doctrine contended for by the plaintiff was applicable only to *sureties* for the performance of *duties or trusts*. That no day of payment was fixed. The defence of the surety, if any he had, was good at law, (*The People v. Jansen*, 7 *Johns. Rep.* 332.) and there was sufficient evidence of the facts on which relief was now sought in this Court. All the allegations in the bill were denied or disproved, except the fact that the plaintiff became surety for *B.*; and it was not competent to the plaintiff to prove the contract different from the terms of the note.

THE CHANCELLOR. The allegation in the bill that the note was procured by fraud, is denied in the answer, and not supported by proof. It is equally denied, and is without proof, that the plaintiff had offered payment of the note. The plain state of the case is, that in *October, 1806*, *Fowler*, with the plaintiff as his surety, gave *Baldwin* a note, payable on demand, and that the note was fairly and freely given, and for a sum then actually and *bona fide* due. The testimony establishes these facts beyond any reasonable doubt. This note was put in suit at law, in 1812, and a recovery had against the plaintiff; though he had set up in his defence the same matters of fact on which he now seeks relief in this Court.

[* 557]

Where a party, on being sued at law, made his defence, which was overruled as insufficient, he cannot, on the same facts, merely, obtain relief in equity.

*Perhaps it would be sufficient to rest the objection to the plaintiff's claim to relief here, on the trial and recovery at law. He has made his defence to a recovery on the note before a Court of competent jurisdiction, upon the same facts that he now puts forward, and that defence was overruled as insufficient. It was observed by the present chief justice, in delivering the opinion of the Supreme Court in the case of *The People v. Jansen*, (7 *Johns. Rep.* 332.) that there was nothing in the nature of a defence by a surety,

to make it peculiarly a subject of equity jurisdiction; and that whatever would exonerate the surety in one Court, ought also in the other. The facts being ascertained, he observed, the rule must be the same in that Court as in the Court of Chancery; and this was, undoubtedly, the opinion of Lord *Loughborough*, in the case to which the chief justice refers.

But the cause has been investigated and discussed here upon its merits, and I am willing to consider it in that light.

It is admitted, that the plaintiff signed the note as surety for *Fowler*, and the only ground for relief is, that *Baldwin* neglected and refused to prosecute *Fowler*, though repeatedly pressed by the plaintiff, until *F.* had become insolvent, and unable to pay. Several witnesses, on the part of the plaintiff, testify, that *Baldwin* often declared that he would not sue *F.*, if he lost his debt; and that he had refused to take part of the debt from the plaintiff. There are witnesses, on the other hand, who declare that *Baldwin* made repeated unsuccessful applications to *F.* and the plaintiff for the money. There are, likewise, some sayings of *Baldwin*, as testified to by *Wm. Brown*, from which an inference has been attempted to be drawn, that *F.* had paid money to *Baldwin* for forbearance; but the testimony is too loose for any safe deduction; and the same observation will apply to much of the testimony respecting declarations of *Baldwin*. There is nothing more dangerous than to impair the force and effect of solemn contracts in writing, by careless, idle, and, perhaps, unmeaning conversations; *and as far as such testimony is in contradiction to the language of the note itself, it is utterly inadmissible.

It will not be pretended, that *Baldwin* was bound to accept of any partial payment from the plaintiff, even if any such was offered, and the question is, whether the omission to prosecute *Fowler*, though requested by the plaintiff to do so, was a discharge of the plaintiff. This is certainly not the common understanding on this subject. It would lead to a great deal of imposition and fraud, if sureties in an obligation for the payment of money could discharge themselves, merely on the ground of the delay or indulgence of the creditor, or by artfully seizing on unguarded remarks in conversation, (perhaps intentionally drawn forth,) expressive of a humane and determined indulgence. I am persuaded there is no rule of equity which goes so far. There are some notes of cases mentioned in *Tothill*, (279, 280.) in the time of *James I.*, in which it would seem that the surety in an obligation had been relieved, where the bond was continued for several years, without his privity. But the note of the cases is so very imperfect, and so destitute of facts

1817.

KING
v.
BALDWIN.

The rules for the relief of a surety are the same at law as in equity, where the facts are the same in both Courts.

Danger of admitting parol declarations, or conversations of parties, to impair written contracts.

[* 558]

1817.

KING
v.
BALDWIN.

[* 559]

*Tothill's Re-
ports* of little
authority.

Mere delay
of the creditor
to call on the
principal debt-
or, for pay-
ment, does not
discharge the
surety, unless
there is an ex-
press contract
for that pur-
pose.

and circumstances, as to be altogether unfit to serve as a guide, and unworthy to be cited as authority. Thus, for instance, the case of *Saunders v. Smith & Churchill* is mentioned, as containing the decision that "a surety was relieved where a bond was continued in use, without his privity, he thinking the same to be paid;" but, at the bottom of the page, we find the same case stated more at large, from which it appears, that though the bond was continued for several years, when the surety supposed it had been paid, and it was then put in suit against the surety, the relief was only granted against the heir of the principal debtor, in consequence of his having sufficient assets. The case of *Mulle v. Roberts* is also cited by *Tothill*, for the position, that "the heir of a surety, where the bonds were continued, without the privity of the surety, was relieved." But if *we examine this same case, as reported in *Nelson's Ch. Rep.* 9., according to *Viner*, (vol. 20. p. 104. pl. 3.) it will be found, that the surety was sued at law, on a bond of 18 years' standing; and it appearing that the obligee had, some years before, purchased lands of the principal debtor, to five times the amount of the bond, it was presumed, from the antiquity of the bond, that the obligee did deduct the debt out of the purchase money, and on that ground the surety was held discharged, and the suit at law enjoined.

This explanation of two cases is sufficient to show what little reliance is to be placed upon the loose notes of *Tothill*, which were collected and alphabetically arranged by him, in the shape of an index, and published after his death.

The established doctrine is, that mere delay in calling on the principal will not discharge the surety, provided that delay be unaccompanied with any settled or binding contract for that purpose. The rule was so understood by Baron *Wood*, on the trial of the case in 10 *East*, 34., and by *Story*, J., in the case of *Hunt v. the U. S.*, (1 *Gallison*, 32.) and by the Ch. J., in the case of *The People v. Jansen*, already referred to. So in the case of *Wright v. Simpson*, (6 *Vesey*, 734.) Lord *Eldon* declared, that he never understood that, as between the obligee and the surety, there was an obligation of active diligence against the principal. The surety was guarantee, and it is his business to see whether the principal pays, and not that of the creditor. The decision in the case of *The Trent Navigation Company v. Harley* (10 *East*, 34.) was founded on the same doctrine, that the mere laches of the obligee, in not calling on the principal, was not a discharge of the surety. I might also refer to the case of *Peel v. Tatlock*, (1 *Bos. & Pull.* 419.) for the same purpose. All the cases of relief of surety have gone upon the ground

that time was given to the principal, by contract, without consent of the surety. The doctrine is, that the surety is bound by the terms of *his contract; and if the creditor, by agreement with the principal debtor, without the concurrence of the surety, *varies these terms*, by enlarging the time of performance, the surety is discharged, for he is injured, and his risk is increased. The surety is entitled to pay the debt when it becomes due, or he may call upon the creditor, by the aid of this Court, to enforce his demand against the principal debtor. On paying the debt, he is entitled to the creditor's place, by substitution; and if the creditor, by agreement with the principal debtor, without the surety's consent, has disabled himself from suing when he would otherwise have been entitled to sue, under the original contract, or has deprived the surety, on his paying the debt, from having immediate recourse to his principal, the contract is varied to his prejudice, and he is consequently discharged. This is the true principle to be extracted from the cases.

In *Skip v. Huey and others*, (1 Atk. 91.) the defendants were bound in a bond to the plaintiff, for the payment of money, and one of them was surety for the other two. The obligee, by a new agreement with one of the debtors, took notes of different persons, payable at future days, in lieu of the bond, and took, also, an agreement of the debtor to make up the deficiency, and delivered up the bond. It was held by Lord Hardwicke, that the obligee was not entitled to any relief against the surety, though the new agreement turned out to be illusory and fraudulent. The next case I shall mention, was that of *Nisbet v. Smith*, (5 Bro. 578.) which lays down the rule of equity, on this subject, with more fullness and precision. The bill stated, that the defendants, after obtaining judgment against one *Maynard*, on a bond to pay a debt from the plaintiff to the defendant, had, *by agreement, staid the execution for three years*, and the judgment was confessed under that agreement. This agreement was made without the knowledge of the plaintiff, who was considered as a surety for *Maynard*, the principal debtor, and relief was granted to him against the *debt by a perpetual injunction. The lord chancellor said, that generally speaking, the surety might come into this Court to compel the debtor to pay the debt, and the Court would compel the creditor to bring his action. But as the creditor had given credit to the principal debtor, for three years longer than the bond imported, at the expense of the surety, and without his privity or consent, the surety was discharged. The same principle was recognized in *Rees v. Berrington*, (2 Vesey,

1817.

KING
v.
BALDWIN.

[* 560]

But if the creditor, by agreement with the principal, *varies the terms of the contract, by enlarging the time of performance, without the consent of the surety, the latter is discharged.*

[* 561]

1817.

KING
v.
BALDWIN.

A surety, when the debt becomes due, may come into equity, to compel the creditor to sue for and collect his debt of the principal.

[* 562]

jun. 540.) The plaintiff in that case was surety in a bond payable by instalments in 1789 and 1790. In *September*. 1790, the money being all unpaid, the obligee came to an arrangement with the principal debtors, and took notes for the two instalments, payable in 1791, 1792, and 1793, and all this was done without communication with the plaintiff, and it was ruled that he was accordingly exonerated. The doctrine there laid down was, that if the condition of a bond be extended, it varied the contract and responsibility of the surety, and increased his risk. A surety does not become bound that the principal shall pay in twelve months, when he was to pay in six, and an indulgence of this nature, contrary to the terms of the original engagement, discharges the surety, if done without his consent. The surety has a right, on the day the debt is due, to come into chancery and insist on its being put in suit; and if the obligee has suspended that right, by a new agreement with the debtor, he has disabled himself to do that equity to the surety which he had a right to demand, and which the relation between the surety and debtor required. So, in *Boulton v. Stubbs*, (18 Vesey, 20.) the surety was held to be released, because the obligee agreed with the principal debtor to postpone his remedy, by changing his immediate right to sue into a right to call for certain instalments. Though this was declared to be done without prejudice to his security, yet it was held to be varying the contract to the injury of the surety, by depriving him of his immediate *right to have the debt collected. The same special agreement with the debtor, postponing the collection of the note, existed in the case of *Deming v. Norton*, (*Kirby's Rep.* 397.) and it was held to be a release of the surety.

The case of *The People v. Jansen*, to which I have already alluded, is certainly not in contradiction to these cases. That case was quite different from that of a bond to a private individual, who is not bound to watch over the conduct of the principal debtor. It was there the special duty, by law, of the supervisors of the county, for whose use the bond was taken, to inspect the conduct and accounts of the principal, who was a loan officer, and the surety had a right to expect and rely on the performance of that duty. It was, therefore, a peculiar case, and attended with very special circumstances and extraordinary *laches*, equivalent to an enlargement of time.

I have said, that the surety has a right, at any time after the debt is due, to apply to this Court to coerce the creditor to collect his debt. All the cases speak this language. In *Nisbet v. Smith*, Lord *Thurlow* admitted, that the surety might apply to chancery, for the purpose of compelling the

obligee to bring his action, and that it was a common case which forced a surety into chancery to be so relieved. So in *Rees v. Berrington*, Lord *Loughborough* said, that "the surety had a right, the day after the bond is due, to come here and insist upon its being put in suit." It is said, in 6 *Vesey*, 734., that he may, on indemnifying the creditor, even compel him to prove the debt, under a commission of bankruptcy. This safe and reasonable doctrine was also a part of the civil law, which allowed a surety who was in peril, to sue for his indemnity or discharge. (*Dig.* 17. 1. 38. 1.) There is no case, however, in the *English* law, in which the personal application of the surety to the creditor was held to be compulsory on the creditor, at the hazard of discharging the surety. But since the argument of this *cause, I have met with a very recent decision of the Supreme Court, in *Pain v. Packard*, (13 *Johns. Rep.* 174.) which decides, that if the holder of a note is requested by the surety, (being one of the joint makers,) to proceed without delay, and collect the money of the principal, who is solvent, and he omits to do it, until the principal becomes insolvent, the surety will be exonerated at law. If this had been understood to be the law, when the case now before me was in the Supreme Court, I should not have been obliged to discuss it; for the same plea in the shape of a notice, under the general issue, was offered as a defence to the action at law, and overruled, on the trial at the circuit, and the decision acquiesced in by the present plaintiff. With the utmost deference for the judgment of the Supreme Court, I cannot as yet find the evidence, that a surety was ever before held discharged by such means. When the cases all speak of the right of a surety to coerce the creditor to sue, by means of an application to chancery, they imply, that he cannot do it by merely calling on the creditor, or by any notice or act, *in pais*. The cases of discharge are all founded on the fact of a *new agreement* between the debtor and creditor, *varying* the contract by which the security originally stood bound. This was the great principle of the case of *Ludlow v. Simond*, (2 *Caines's Cases in Error*, 1.) When the surety has ample and well-settled means of relief, through the medium of a Court of equity, which will at once *compel* the creditor to his duty, it is not necessary, and, as I humbly apprehend, not expedient, to introduce a new principle of action between creditor and surety. Will it not open a litigious inquiry as to the certainty and efficiency of the notice, and does not such a weapon, left at large in the hands of a surety, afford temptation to vexation, imposition and fraud? As the relief was hitherto granted, there could be no injury, misunderstanding, or

1817.

KING
V.
BALDWIN.

[* 563]

Case of *Pain*
v. *Packard*, 13
Johns. Rep. 174.
questioned.

1817.


 KING
 V.
 BALDWIN.
 [* 564]

abuse. I feel embarrassed, between my respect for that decision, and my conviction *that the previous rule was different. But I am too well acquainted with the learning, the talents, and the liberality of that Court, not to know, that a free discussion of legal principles is perfectly agreeable to their disposition and character; and I feel the less oppression under the weight of that authority, as the point appears not to have been argued by counsel, or elaborately discussed, and we have only a short note of the decision. In one of the cases. I have referred to, Justice *Story*, of the Supreme Court of the *United States*, after examining the question with his usual diligence and ability, declares, that he can find no case, that mere delay to require payment, without any contract for that purpose, has been held to vary the responsibility of the surety; and he adopts it as a sound principle, that delay, unaccompanied with *fraud*, or a settled *agreement* with the principal for that purpose, will not discharge him. If the rule had been that delay, though contrary to the declared wishes of the surety, would exonerate, the books would not have been without precedents, for the case must have been of almost daily occurrence.

I am obliged to conclude, that the plaintiff is not, in this Court, entitled to relief. He has not availed himself of the established means, in his power, of compelling *Baldwin* to collect his debt of *Fowler*; and there is no proof or pretext, that *Baldwin*, by any agreement with *Fowler*, enlarged the time of payment, or impaired the rights of the plaintiff, in his relation as surety. The plaintiff might, at any time, have paid the debt, which he admits he never offered to do, or he might have compelled, by application to this Court, the collection of the debt of *Fowler*. He has done neither, and has no ground for equitable relief.

I am, accordingly, of opinion, that the bill be dismissed, with costs.

Bill dismissed.

1817.

RIGGS
V.
MURRAY

*RIGGS and others, assignees of R. MURRAY, a bankrupt, *against* J. B. MURRAY and others.

An assignment by a debtor of all his property in *trust*, to pay the trustees, and such other creditors as the debtor, in one year, by deed, might direct and appoint, &c., reserving a power to appoint new trustees, and to revoke, alter, add to, or vary the trusts, at his pleasure, is fraudulent and void.

The trustees, under such deed, were decreed to account for the proceeds of the property received by them under the assignment, with interest, deducting their commissions and charges; and to be entitled only to come in, *pari passu*, with the other creditors, for their ratable proportion of the debtor's estate.

ON the 23d of *March*, 1798, *Robert Murray*, for himself, and as attorney (duly authorized) for his partners, *George W. Murray*, *John R. Wheaton*, and *James V. Murray*, made an assignment of all their partnership property in the *United States*, to *John B. Murray* and *John Innes Clark*. The deed recited, that the copartners had become insolvent, and were unable to pay their debts, and that the assignees had advanced money, and became bound for them in large sums, from motives of pure friendship, and that they considered themselves bound in honor to secure the assignees as far as they were able; and the deed also admitted, that they had previously made several particular assignments to those assignees and others, for particular purposes, and for their indemnity. This assignment was made expressly *in trust*, to sell, collect, and receive the property, and to apply the proceeds to the payment of the balances due to the trustees, and to such other creditors as the assignors should, by deed, within one year thereafter, name and specify; and to *each of them*, and at *such times* and in *such proportions*, and on *such terms and conditions* as they, by *such deed*, should direct, and in default of such direction, then in trust for the grantors, and, further, with power to change the trustees, &c.

On the 24th of *March*, 1798, the grantors, by deed, reciting *the former deed, appointed and directed the grantees to pay, out of the property assigned, the expenses of the trust, and to retain and to pay themselves, and for divers other purposes therein particularly specified, several sums of money therein specified; reserving, however, to the grantors, a power, by a deed, at any time before a complete adjustment of the trust, within one year, to alter or revoke the appointments.

September 30th.

[* 566]

1817.

RIGGS
V.
MURRAY.

On the 21st of *March*, 1799, the grantors, by deed, revoked and annulled the appointments and trusts of the deed of the 24th of *March*, 1796, and appointed and appropriated the property before assigned to the payment of the charges of the trusts, and to the payment of the trustees and certain other specified creditors, such sums and in such proportions of the moneys due them respectively as the grantors should, thereafter, by deed, direct and appoint.

On the 22d of *March*, 1799, the grantors, by deed, referring to the former assignment, directed the trustees to pay, out of the property assigned, the expenses of the trust, and to pay themselves and divers other creditors, therein mentioned, the sums due them at the times, in the proportions, and upon the terms and conditions therein expressed; reserving the right and power in the grantors, by deed, at any time before a complete and final adjustment, to alter or revoke all, or any, of the said appointments and directions, and to make and declare any new appointments or trusts at their pleasure.

On the 31st of *May*, 1800, the grantors, by deed, referred to, and partly recited the former deeds of the 23d of *March*, 1798, and 22d of *March*, 1799, and recited further, that the grantors were desirous to alter the appointments made by the last of those deeds, and to make other and further appointments and directions; they did, therefore, by virtue of the power to them reserved, order and appoint, that out of the proceeds of the property assigned, the trustees should pay: (1.) all expenses incurred; (2.) towards *the support of the grantors from the 28th of *March*, 1798, until they should be respectively discharged from their debts, or until one year after they should be discharged by law, not exceeding 2,000 dollars a year, for each of the grantors; (3.) to pay certain creditors named; (4.) to pay themselves certain specified debts; (5.) to pay other debts due the trustees, and several other creditors therein mentioned, on a due liquidation, &c.; and, generally, to pay all persons who were or should be bail for the grantors, or either of them; (6.) that the assignees should make a final settlement with the creditors last mentioned, on certain terms mentioned, and that the assignees should hold the balance of trust property, subject to the further order of the grantors, and that the creditors who should not, within one year, accept of the conditions, or should knowingly embarrass the objects aforesaid, should be forever excluded from any share under the assignment.

A separate commission of bankruptcy was issued, on the 15th of *June*, 1801, against *Robert Murray*, who was then, and since 1796, had been in confinement, for debt. On the 2d of *July*, his property was assigned to the plaintiffs, who,

[* 567]

in 1802, filed their bill against the trustees, *Murray & Clark*, and making the grantors also parties. In this bill they charged, that *Robert Murray* did business in *New-York*, and the other partners went abroad to *Europe* to avoid and defraud their creditors. That *Robert Murray*, as partner, had contracted debts to upwards of 700,000 dollars; that the assignment of 1798 was fraudulent, and made to delay, hinder and defraud the creditors. The bill further charged, that the private property of *Robert Murray*, exclusive of his share in the partnership property, was very inconsiderable, and the bill prayed that the trustees might come to an account with the plaintiffs for all moneys received belonging to the partnership estate, and that they might be directed to deliver up all books, vouchers and papers belonging to the estate, or firm, and that they *might pay to the plaintiffs what they were entitled to receive, as assignees, and might assign and deliver over all securities, &c., and that the several assignments to the trustees might be declared fraudulent and void.

To this bill *Robert Murray*, *George W. Murray*, and *John R. Wheaton*, generally answered, setting forth their bankruptcy and discharge, under the bankrupt act of the *United States*.

The answers of *John B. Murray*, and *John Innes Clark*, admitted the several bills of assignment and appointment, and most of the facts charged in the bill, but denied fraud in any of the transactions. They stated, that within one year from the date of the last deed, certain creditors therein named, and the trustees themselves, did agree and assent to the terms expressed. That the four first deeds were delivered to the defendant *Clark*, and were, afterwards, mislaid and lost. That *Robert Murray* acted as agent for the trustees, in several matters relating to the trust. That the property assigned was greatly deficient in paying the debts covered by the assignments. That *James V. Murray*, one of the partners, claimed the funds received by the trustees, and had filed his bill for that purpose. The trustees stated the amount received, and submitted to account, and pay the balance, if any, &c.

Clark died after putting in his answer, and the suit was revived against his executors; and in *August*, 1809, a settlement took place between the plaintiffs and the executors of *Clark*, with the assent of *John B. Murray*, and of all other parties concerned, and a rule was entered, by consent, on the 2d of *August*, 1809, stating the agreement, and that the plaintiffs had agreed to receive the balance of the trust property due from the estate of *Clark*, after deducting all moneys justly due to him, and intended to be secured by the as-

1817.

RIGGS
V.
MURRAY.

[* 568]

1817.

Riggs
v.
MURRAY.

[* 569]

signments, and all moneys paid by him, in good faith, on account of the trust. That the balance was to be paid in real property, at a fair valuation, and in full discharge of what *Clark* was *liable for, without waiting for a final decree as to the trust property, in the hands of the defendant *John B. Murray*, or as to the rights of the several claimants on the trust fund. The rule further specially provided, that the plaintiffs were not to be precluded from litigating the validity of the assignments, so far as respects all objects and purposes, except the estate of *Clark*; and it was further agreed that the defendant *John B. Murray* was to account for the trust property which came to his hands; and that if it should be determined, that the deeds were valid, as to all or any of the *cestui que trusts*, that then, after applying to the payment thereof, the balance, if any, in the hands of *John B. Murray*, after deducting his *bona fide* payments, and the sums due to him, and to the house of *Murray & Mumford*, the residue due to such *cestui que trusts* should be made good out of the funds to be derived from the executors of *Clark*.

The balance due from the executors of *Clark*, under the rule, was duly ascertained, and reported to be 78,328 dollars and 55 cents; and it was discharged by a payment to the plaintiffs of 6,000 dollars in cash, and the residue in lands, conveyed to the assistant register of the Court, subject to the orders of the Court, and the executors were consequently discharged.

The cause, as to *John B. Murray*, proceeded to issue and publication, but no proof was taken on either side.

On the 16th of *October*, 1812, a rule was entered, by consent, referring it to the master, to take an account of the moneys received by the defendant *John B. Murray*, as trustee aforesaid, and of the sums paid or retained by him, and which ought to be allowed him, in pursuance of the deeds of trust, and the particulars of such receipts, payments and allowances, and *that all questions be reserved*.

[* 570]

The master reported, on the 1st of *July*, 1816, that he had been attended by both parties, and that the defendant *John B. Murray* had received, under the trust, *81,836 dollars and 99 cents, "after deducting all charges and commissions which accrued thereon;" that there was due to him, and to the firm of *Murray & Mumford*, under the assignment, after crediting all he had received for principal and interest, on the 1st of *September*, 1814, 95,688 dollars and 25 cents, and which, with interest to the date of the report, amounted to 102,548 dollars.

The plaintiffs excepted to the report, on the ground that the defendants, *John B. Murray* and *Murray & Mumford*,
442

did not, nor did either of them, appear, by any thing in evidence before the master, to be entitled to be paid out of the property assigned, &c.

The cause came on to be heard in *June* last, on the final equity reserved; at the same time, the petition of the defendant *John B. Murray* was read, stating his rights under the assignment, and the history of the cause, and praying for an order that the plaintiffs pay to him the 6,000 dollars received by them from the executors of *Clark*, and that the lands conveyed to the assistant register may be conveyed to him, or sold, and the proceeds to be paid to him, and that such sale be at the expense of the plaintiffs, if they wish a sale, and the funds should eventually prove deficient.

1817.

Riggs
v.
MURRAY.

Harison, for the plaintiffs.

June 16th and
17th.

He stated the following points:

1. That the several assignments were fraudulent and void, as appeared from the answer of the defendant *John B. Murray*, and upon the face of them.

2. That the money received under the assignments, in the hands of *John I. Clark*, at the time of his decease, and the amount received by *John B. Murray*, and stated to have been paid over to *Murray & Mumford* and others, belonged to the plaintiffs, in trust for all the creditors.

The badge of fraud in the assignment of 1798, was the *clause of revocation; and though fraud be denied in the answer, and there be no proof of fraud in fact, (for which he did not contend,) yet if the deeds, from the face of them, and from the circumstance attending them, were, in judgment of law, fraudulent, they ought not to be permitted to stand.

[* 571]

That if the assignments were made in contemplation of bankruptcy, they were fraudulent, because made to defeat an act which passed in *April*, 1800, and which the grantors knew was to be in operation the day after the deed of the 31st *May*, 1800. He cited 15 *Vesey*, 449. 3 *Johns. Rep.* 71.

N. Pendleton, *D. B. Ogden*, and *S. Jones, jun.*, contra.

They submitted the following points:

1. That the defendant having denied the allegations of fraud, and no proofs being taken in the cause, and there having been a reference, by consent, to ascertain the amount due under the assignment of the 31st of *May*, 1800, no question can exist as to its validity, or the defendant's rights under it.

1817.

Rices
v.
MURRAY.

2. That the defendant is entitled, for *Murray & Mumford*, to the lands conveyed and the moneys paid to the plaintiffs by the executors of *Clark*.

3. That the other defendants ought to be dismissed with their costs, having been discharged under the bankrupt act.

They contended that the assignment of 1798 was valid: that preference may be given by an insolvent debtor: that the *bona fide* debts due the trustees, more than exhausted the property assigned: that the defendant was entitled to be paid, under the assignments, his private and partnership debts: that *Robert Murray* was not a bankrupt until *June*, 1801, and that no deed could be void under the bankrupt act, unless it was, of itself, an act of bankruptcy. 1 *Burr.* 467.

September 30th.

The cause stood over for consideration until this day.

[* 572]

*THE CHANCELLOR. The material question in the case is, whether the deed of assignment, of the 23d of *March*, 1798, was not, in judgment of law, fraudulent, as against the creditors at large. That was the only deed that assigned the partnership property; the subsequent deeds, between the same parties, including the one of the 31st of *May*, 1800, were merely directions to the trustees, founded upon that original deed of assignment. If that deed was void, the succeeding deeds must share its fate, as they were incidental to, and dependent upon it. They were all connected parts of one transaction.

There were five deeds between the parties, bearing date successively, on the 23d of *March*, 1798, the 24th of *March*, 1798, the 21st of *March*, 1799, the 22d of *March*, 1799, and the 31st of *May*, 1800. They have all been mislaid, lost, or destroyed, except the last, which is made an exhibit in the cause, and from the recitals in that deed, and from the answers of the defendants *J. I. Clark* and *J. B. Murray*, we are enabled to ascertain the contents of the four lost deeds.

It appears that by the deed of the 23d of *March*, 1798, *Robert Murray & Co.* assigned all their partnership property in the *United States*, to *Clark & Murray*, in trust. The inducements to the assignment are contained in the recitals in that deed; by them it appears that the house of *Robert Murray & Co.* had become insolvent, and that *Clark & Murray*, and others, had advanced moneys and become bound for them in large sums, from motives of friendship; that in consequence thereof, they considered themselves bound in honor to secure these creditors, as far as they were able. The deed further recited, that *Robert Murray & Co.*

had, before that time, made several particular assignments of particular subjects, to *Clark & Murray*, separately and jointly, for particular purposes, and for their indemnity, &c. The deed then granted and assigned the subjects previously assigned, and the excess *thereof, and their several books of account, and ledgers, and certain debts and property particularly specified, to *Clark & Murray*, and to the survivor, in trust, to sell, collect, and receive the property, and to apply the moneys in payment and satisfaction of the debts and balances due to *Clark & Murray*, and to such other creditors as the grantors, by deed, within one year, should designate, and to each of them, at such times, in such proportions, and upon such terms and conditions, as the grantors, by such deed, should direct; and in default of such direction and appointments, in trust for the grantors. The deed also reserved a power to the grantors, in case they were dissatisfied with the trustees, to appoint others, with or instead of the trustees therein appointed, who were to be subject to the same trusts.

This assignment, as it plainly appears from the instrument itself, was made subject to the future direction and control of the assignors, and liable to be revoked and annulled at their pleasure. The payment of the debts due to *Clark & Murray*, as well as to the other creditors, to be named and specified, was equally subject to the power of future control and revocation. The payments were to be made in discharge of the debts due to *C. & M. and to such other creditors* as should be thereafter specified, and then the subsequent words, *and to each of them, at such times, in such proportions, and on such terms, &c.*, are to be applied, *reddendo singula singulis*, equally to the creditors named, and thereafter to be named. This is the natural and grammatical construction and meaning of the sentence. The power also reserved, to change the trustees, shows, that the grantors intended to retain to themselves the entire control of the deed of trust. As trustees, *C. & M.* were made subject to removal; and as creditors, they appear to have been placed on an equal footing with other creditors coming in under the deed, and the substituted trustees (if any had been named) would certainly have considered *them as not entitled to any preference, and would have dealt with them as they dealt with the other creditors named, *subject to the future dispositions and directions of the grantors.*

The subsequent deeds show, conclusively, the sense of the parties on this subject, and that the payment of the debts due to *Clark & Murray*, as well as to others, was to depend on the future direction of the grantors.

The next deed was dated the 24th of *March*, 1798, or the

1817.

Riggs
v.
MURRAY.
[* 573]

[* 574]

1817.

Riggs
v.
MURRAY.

day following the original deed of assignment. It recited that deed, and the trusts of it, and then, by virtue of the power reserved, it directed *Clark & Murray* to retain and pay the expenses of the trust, and, also, *to retain and pay to themselves*, and for divers other purposes therein specified, several sums therein mentioned, reserving still the power, by deed, at any time before a complete adjustment of the trust, within one year to be made, *to alter, revoke, add to, or vary, the said appointments.*

We come next to the deed of the 21st of *March*, 1799. That deed revoked and annulled, to all intents and purposes, the appointments and trusts of the deed of the 24th of *March*, 1798, and appointed and appropriated the property before assigned, to the payment of the expenses of the trust, and then that the trustees *should retain and pay to themselves, and to certain other persons therein mentioned*, such sums, and in such proportions, *as the grantors should at any time thereafter, by deed, direct and appoint.*

[* 575]

The fourth deed, of the date of the 22d of *March*, 1799, contains a very explicit and entire control over the whole assignment of 1798, and as well of the payments to be made to the trustees, as to the other specified creditors. It recited the original assignment, and the powers therein reserved, and then directed the trustees to retain and pay, out of the proceeds of the property assigned, the expenses of the trust, and then *to retain and pay to themselves, and to divers other creditors, the debts owing to them, and to *such other creditors, in the manner, at the times, in the proportions, and upon the terms and conditions therein expressed.* By this deed the grantors also reserved to themselves full power, by any other deed, at any time before a complete and final adjustment should be made, *the said, and first before mentioned instruments*, (referring to the first deed of 1798,) *to alter, and revoke all, or any part of the said directions and appointments, and to add to and make any further and other directions and appointments, &c.*

We come, lastly, to the deed of the 31st of *May*, 1800. That deed recited the substance of the original deed of assignment, and of the declaration of trust of the 22d of *March*, 1799, and then recited that the grantors were desirous to alter the directions and appointments in the last deed, and to make others. They accordingly direct the trustees, out of the property originally assigned, to pay the expenses of the trust, then to pay, not exceeding 2,000 dollars a year, to each grantor towards his support, next to pay certain creditors in *England*, and, fourthly, to retain and pay the debts due to themselves, and the house of *Murray & Mumford*, as

therein specified, and also to pay certain other creditors, &c.

There is no further express reservation in this deed, of a power of revocation. The grantors seem, at last, to have grown weary of sporting with the property as their own. It may be doubted, however, whether the power of revocation in the prior deed was not still in force. It was to continue until a complete and final adjustment of the accounts, and whether such an adjustment took place before the act of bankruptcy committed, does not appear from the case. This last deed proves, beyond contradiction, that the assignment of 1798 was as much under the control of the grantors, in respect to the payment of the debts due to the *trustees*, as in respect to the payment of any other creditors. The deed was made between *Robert Murray & Co.*, of the first part, *Clark & Murray*, as trustees, *of the second part, and the said parties of the second part as creditors, and all such other creditors who should become parties to the deed, by executing it, or otherwise consent to its conditions, of the third part. It appears that *Clark & Murray* did, as creditors, become parties to this deed, by also executing it; for it was made upon this express condition, that the parties of the third part should accede to the terms of the deed, by becoming parties to it, and that those who should refuse or neglect to accept of the conditions annexed to the deed, respecting the credits, &c. within one year, should be forever excluded from the benefit of its provisions.

This last deed professed to be nothing more than a declaration or appointment of trusts, created by the first deed of 1798, and founded on the powers reserved in that and the subsequent deeds. It was not, of itself, any assignment or transfer of the property. It referred to the deed of 1798, as the only subsisting title or assignment, and if that deed be removed, or declared void, the whole superstructure falls to the ground.

It may, also, be assumed, as a clear and undisputed fact, that, whether these deeds be viewed separately, or taken (as they ought to be) in connection, as parts of one whole, and forming one entire act, they were made subject to the future disposition and power of the grantors, as well in respect to the debts due to *Clark & Murray*, as in respect to the debts of the other creditors, alluded to in those deeds. This leads us to the consideration of the important question arising out of this case, whether such an assignment, by an insolvent debtor to a few select creditors, with such a power of revocation attached to it, can be deemed valid in law. The necessary inference seems to be, that it was made "to

1817.

Riggs
v.
MURRAY

[* 576]

Though assignments in trust, with a power of revocation, may be good in family settlements, yet

1817.

RIGGS

v.

MURRAY.

[* 577]

a power of revocation, reserved by a debtor, in an assignment of his property to pay certain creditors, renders the instrument fraudulent and void.

In equity, the rule of distribution is equality, and creditors are paid, *pari passu*, in ratable proportions.

Where there is no bankrupt law, the principle of which is equality among creditors, an insolvent debtor may prefer one creditor to another; but such preference is to be viewed with [* 578] jealousy, and should be strictly construed, so as to guard against abuse and fraud.

delay, hinder, or defraud creditors." Family settlements may often require such powers of revocation, to meet the ever-varying interests of family connections; but it is difficult to perceive a proper motive *in a debtor who means nothing more or less than the payment of a debt, to reserve, in the very instrument of assignment, a right to recall the payment. The only effect of such an assignment is to mask the property. If tolerated, it would become an inlet to fraud, and lead to all imaginable abuse. Insolvent debtors are, no doubt, permitted to give preferences, where no legal claims exist, and to pay one creditor to the exclusion of another; but this has not a very extensive application in the *English* law, for it is controlled by the operation of their bankrupt system, in which equality is equity, and preferences are forbidden. If the rule was not thus checked in practice, and confined to cases which usually do not relate to commercial dealing, I much doubt whether it would have been so long endured in the *English* administration of justice. The rule in chancery, when property is placed under the jurisdiction of that Court for distribution, has always been different; the creditors are paid, *pari passu*, in ratable proportions, and the same rule is adopted in all our statute distributions of property for the payment of debts. "It is founded on this," says Lord Talbot, "that, by natural justice and conscience, all debts are equal, and the debtor himself is equally bound to satisfy them all."

The doctrine of equality in payment prevails also in the bankrupt system in *France*, (*Code de Commerce*, art. 443. 558.) and all partial assignments, by an insolvent debtor, are considered in that country as fraudulent and void.

As we have no bankrupt system, the right of the insolvent to select one creditor, and to exclude another, is applied to every case, and the consequences of such partial payments are extensively felt, and deeply deplored. Creditors out of view, and who reside abroad, or at a distance, are usually neglected. This checks confidence in dealing, and hurts the credit and character of the country. These partial assignments are, no doubt, founded, in certain cases, upon meritorious considerations; yet the temptation *leads strongly to abuse, and to the indulgence of improper motives. The master of the rolls, in *Small v. Oudley*, (2 P. Wms. 427.) and the lord chancellor, in *Cock v. Goodfellow*, (10 Mod. 429.) admit that such preferences, by a sinking debtor, may, and, in certain cases, ought to be given, and are called for by gratitude and benevolence; yet, at the same time, it is acknowledged that the power may be abused, and be rendered subservient to fraud. Experience shows, that preference is

sometimes given to the very creditor who is the least entitled to it, because he lent to the debtor a delusive credit, and that, too, no doubt, under assurances, of a well-grounded confidence of priority of payment, and perfect indemnity, in case of failure. How often has it happened, that that creditor is secured, who was the means of decoying others, while the real business creditor, who parted with his property on liberal terms, and in manly confidence, is made the victim. Perhaps some influential creditor is placed upon the *privileged* list to prevent disturbance, while those who are poor, or are minors, or are absent, or want the means or the spirit to engage in litigation, are abandoned.

The grantors mentioned, in their deed of 1798, that they were bound *in honor* to secure the two assignees; this would seem to imply that they were not equally bound in honor to pay all their just debts. The notion of honorary debts, in contradistinction to the other debts, founded on fair and adequate consideration, is a dangerous distinction, and calculated to injure or mislead the moral sense. The law does not recognize such a principle of honor, and we have no means by which we can test its purity, or separate it from arbitrary, selfish, or vindictive motives of preference. The principle is too uncertain, flexible, and capricious in the application.

I do not question the legality, however I may doubt the policy, of the rule which sanctions such partialities. It has been long established, and the authorities to this point *were referred to by me, in the case of *Hendricks v. Franklin*.† I mean, however, to be understood, that the application of the rule is always to be watched with jealousy, and that we are not required, by any reasons of expediency or justice, to enlarge the rule by giving it a new and dangerous facility. We ought to require of the insolvent, when he undertakes to make preferences, by assignments in favor of a class of honorary or privileged creditors, that he should do it absolutely and definitively, and not make the assignment to depend upon his future will and pleasure. Such a reservation gives an alarming aspect to the assignment, and betrays some forbidden or lurking design. I have no difficulty, therefore, in considering the deed in question as colorable merely, and fraudulent in respect to the general creditors.

That such powers of revocation are fatal to the instrument, and poison it throughout, appears to have been well established by authority.

The statute of 27 *Eliz.*, and which we have re-enacted, (Sess. 10. ch. 44. s. 5.) declares all grants of land, with power of revocation, void, against subsequent purchasers, for a valuable consideration. In *Tyrer v. Littleton*, (2

1817.

Riggs
v.
MURRAY.

The law recognizes no distinction among creditors, or of such debts as are honorary or privileged to be paid before others.

[* 579]

† *Ante*, p. 283.

1817.

Riggs
v.
MURRAY.

Brownl. 190.) *Winch*, J., said, that a deed with power of revocation, was apparent fraud by the statute, and the Court might take notice of it without averment. The meaning of that opinion was, that such a deed is fraudulent in law, and that there is no need of proof of fraud, in fact. So it was said in *Twine's* case that the statute had put voluntary estates, with power of revocation as to purchasers, on the same footing with conveyances made by fraud. Such a power in a conveyance is recognized by that statute, as a clear and distinct mark of fraud; and that, and the other statutes of fraud, were only declaratory of the known principles of the common law.

[* 580]

The law is so jealous on this subject, that if the deed contains a power in any way equivalent, in its effects, to a *power of revocation, it is fatal. Thus, in *Lavander v. Blackstone*, (2 *Lev.* 146. 3 *Keb.* 526. pl. 11.) it was held by the K. B. that a conveyance by an insolvent debtor, in trust to pay debts, was fraudulent, because, among other things, it had a proviso, enabling the grantor to make leases for any term, without rent, and this was considered as putting it in his power to defeat the whole settlement, for *though the consent of the trustees was necessary*, yet they were trustees of his own nomination. So exceedingly strict and scrupulous was the K. B. on this point.

But the case which comes nearer to the one before me, is that of *Tarback v. Marbury*. (2 *Vern.* 510.) The defendant there made a conveyance of his estate to trustees, to the use of himself for life, and with power to mortgage the same, the remainder to the trustees to sell and pay his debts. The question was, whether creditors by subsequent judgment must submit to come in under this deed of trust, and the lord keeper held the deed fraudulent, because, the defendant having reserved to himself a power to mortgage and charge the estate with sums he thought fit, he might have charged it to the full value, which amounted, in effect, to a power of revocation, which rendered it fraudulent against the creditors.

A reservation of a part of the interest to himself, as in that case, and in the one of *Estwick v. Caillaud*, (5 *Term.* 420.) does not destroy the provision in respect to the residue, though if the part unreserved be deficient, the creditors might, perhaps, apply to a Court of equity for the residue. But if the power enables the grantor to defeat the whole provision, all the cases concur in declaring it null and void.

[* 581]

The principle established in these cases is perfectly applicable to the deeds before us. The only difference, if any, is, that the mischiefs and frauds to which the power of revocation may be made subservient, render the rule *more
450

valuable, and more indispensable, in the disposition of personal estate.

The assignment of property, in discharge of a debt, is a very simple transaction; yet the one in this case was wonderfully complex. There were five deeds, all relating to one subject, and annulling each other in rapid succession. Nothing is pretended to have been done, between *March*, 1798, and *May*, 1800, that was stable or definitive. The case is destitute of that simplicity which attends fair and ordinary dealings. To sanction such transactions in a debtor, who was at the time avowedly insolvent, and professing to make partial dispositions of his property, would be dangerous, and is inadmissible upon principles of policy as well as of law and justice. The last deed was poisoned by its connection with those that preceded it, and by the aliment which it drew from them.

Even if the deed of the 31st of *May*, 1800, was to be considered independently of those which preceded it, it was so clogged with conditions and provisions in favor of the grantors, as to be unfit to be sanctioned as a valid partial assignment.

It was made to depend, in the first place, upon the agreement of the grantees, and of the other specified creditors, within the space of twelve months, to all its conditions. One of the earliest provisions in the deed, and which had preference to all others, except the one relating to the expenses of the trust, was to allow to each of the insolvent grantors a sum not exceeding 2,000 dollars a year, for their support and maintenance, from *March*, 1798, "until they should be completely released and discharged from all their debts, or until twelve months after they should have secured such release and discharge by law." Another condition was, that the specified creditors were to give "security to use all means in their power to render the property, lodged in trust with them, productive, &c." It was, finally, added, that "if any of the persons intended to *be parties of the third part," (and which of course included the grantees, *Clark & Murray*.) "should, at any time, knowingly and wilfully embarrass, or attempt to injure the objects therein contained, such party should be forever excluded from a share or participation therein."

If an insolvent debtor may make sweeping dispositions of his property, to select and favorite creditors, yet loaded with such durable and beneficial provisions for the debtor himself, and encumbered with such onerous and arbitrary conditions and penalties, it would be impossible for Courts of justice to uphold credit, or to exact the punctual performance of con-

1817.

RIGGS
V.
MURRAY.

[* 582]

1817.

RIGGS
v.
MURRAY.

The trustee under an assignment fraudulent and void, though a creditor will be ordered to account for all the property received under the assignment, with interest, deducting his commissions and costs, and to come in, *pari passu*, with the other creditors, for his ratable proportion of the debtor's estate.

tracts. It will not, therefore, be in my power to give to the defendant *John B. Murray*, any aid under the assignment; and his petition, for the property received by the plaintiffs from the executors of *Clark*, must, of course, be denied.

The next question is, whether I ought not to go further, and make the defendant account for the property he has received under the assignment, and place *that* also in the hands of the plaintiffs, for general and equal distribution. I do not see any principle that will justify me in denying to the plaintiffs the full object and entire equity of their bill. The defendant ought not to be permitted to avail himself of any advantage over the other creditors under an assignment fraudulent on its face, and to which he, no doubt, lent his voluntary sanction from the beginning. If the assignment was void, as against the general creditors, the title of the defendant to the property which he received under it fails. He came by it wrongfully, and to permit him to hold it, by setting off his own debt against it, would be giving effect to a transfer condemned in law. It cannot be done without a sacrifice of the principle. The doctrine of set-offs is founded in natural justice, and never was applied to a case where the party came by property wrongfully. He can no more be allowed his set-off against property acquired by a fraudulent deed, than if he had acquired it tortiously; and though the grantor himself might be estopped from recalling the property, yet his assignees under the bankrupt act represent the creditors at large, and are not so concluded. If the defendant is entitled to be paid under the assignment, the other creditors who were specially named in it, have, at least, equal, if not superior pretensions, and we should thus confound all distinction between one kind of assignment and another, and render the conclusions of law vain and nugatory. I cannot perceive any other alternative, but either to give complete effect to the assignment as a fair and valid instrument, free from any noxious quality, or to make the defendant account for the property he received under it. The latter is the proper conclusion. It gives triumph to principle, and becomes, as a precedent, beneficial hereafter.

The great amount of the property in question, is a circumstance I have felt, and it has awakened much anxiety in the consideration of the case. But, it must not, and cannot, affect the operation of established principles. Having satisfied myself that it is legal and just, it then becomes a duty to make the defendant account for the property he received under the assignment. He will still stand on an equal footing with the general creditors, and be paid in a ratio, to the amount of his debt. He may lose part of his

[* 583]

demand by this means, but he will be placed upon an equality with other creditors, whose demands are equally just, and equally necessary to them, and who must lose in the same proportion.

It is scarcely necessary for me to add, (though it was made a point on the part of the defendant,) that there is nothing in the proceedings which excludes the plaintiffs from the full assertion of their rights. The settlement with the executors of *Clark*, (and with which this Court had no concern,) was made under an express reservation, acceded to on the part of the defendant *John B. Murray*, of the right to litigate with him the validity of the assignment; *and in the rule, referring, as a provisional measure, the accounts of the defendant to a master, all questions were reserved. This is the first time that the validity of that assignment, and of the deeds dependent upon it as incidents, has been submitted to the consideration of the Court.

I shall, accordingly, decree, that the defendant *John B. Murray* account to the plaintiffs, for the 81,836 dollars and 97 cents, which, it appears by the master's report, was the net sum, after deducting charges and commissions, which he had received under the assignment; and he must account for that sum, with interest from the date of the report, and with costs of suit. The bill, as to the other defendants, is dismissed without costs.

Decree accordingly.

453

1817.

Rices
v.
MURRAY.

[* 584]

1817.

GILLESPIE
v.
MOON.

*GILLESPIE, and ELIZABETH his wife, *against* MOON.

Equity relieves against a *mistake*, as well as against fraud, in a deed or contract in writing; and *parol* evidence is admissible to prove the mistake, though it is denied in the *answer*; and this, either where the plaintiff seeks relief, affirmatively, on the ground of the mistake, or where the defendant sets it up as a defence, or to rebut an equity.

- As where a trustee for an infant, in 1799, agreed to sell 200 acres of land, (part of a lot, containing 250 acres,) and executed a deed to the purchaser, (a tenant on the lot,) which described the premises by metes and bounds, "containing 200 acres, more or less;" and the bounds included the whole lot, or 250 acres; and the trustee died in 1814, without taking any measures to have the mistake corrected, though she expressed her intention to do so, in 1806; and the *cestui que trust*, immediately after her death, filed a bill for relief against the mistake; the vendee was decreed to re-convey to the plaintiff the 50 acres, without any allowance for valuable improvements made thereon; they being made after he knew of the mistake, and had declared his intention to take advantage of it.

The evidence to show a mistake in a written instrument must be clear and strong, so as to establish the mistake to the entire satisfaction of the Court.


- And, it seems, that *parol* evidence of *confessions* or declarations of the defendant, as to the mistake, made 13 years before, if uncorroborated by other facts or circumstances, will not be sufficient.

September 30th.

GEORGE BREWERTON and others, on the 1st of June, 1799, by deed, released and conveyed to *Elizabeth Mann*, (widow,) in fee, "a tract of land in the provincial patent, in the county of *Washington*, known by lot No. 57. and bounded east by lot No. 56, west by lot No. 58, north by lot No. 54, and south by lot No. 64, containing *two hundred and fifty acres*, be the same more or less," in trust, to apply the rents and profits thereof, to the use, and for the support, &c. of *Elizabeth De Haert*, (plaintiff,) until she arrived at the age of 21 years, or married, and then to the use of the said *Elizabeth*, in fee; and in case the premises should not yield a sufficient maintenance for her, then in trust to sell the same, and vest the moneys in real estate. the interest thereof to be applied as aforesaid. The bill stated, that at the time of the execution of this deed, *fifty acres* of the north-east corner of the *lot, in a square form, were under a lease to *Jonathan Cable* and *Benjamin Atwell*, for the term of nine years from the 9th of *November*, 1791, at the annual rent of fifteen dollars, which lease contained a covenant of renewal, and if the premises were sold, that the lessees should have the right of *preëmption*; and if the lease was not renewed, nor the premises sold, the improvements

[* 586]

1817.


 GILLESPIE
 v.
 MOOR.

made by the lessees were to be appraised and paid for by the lessor. That, on the 18th of *April*, 1791, *Atwell* released his interest to *Cable*, who erected valuable buildings, and made other improvements on the premises; and, on the expiration of the release, continued in possession, as tenant, from year to year, until some definitive arrangement should be made. That at the time of the execution of the above deed, the defendant occupied the 200 acres, under a lease; and Mrs. *Mann*, afterwards, contracted to sell and convey the same to him; and, on the 9th of *June*, 1804, she executed a deed to the defendant for the land, describing it by metes and bounds, and as *containing 200 acres of land, more or less*. That the description and bounds in the deed to the defendant were copied literally from the description in the former deed, except as to the number of acres, and through *mistake or fraud*, was made to comprise within the bounds the whole 250 acres conveyed to Mrs. *Mann*, and including the 50 acres leased to *Cable*, and which were not intended to be included. That Mrs. *Mann* was ignorant of business, and the deed to the defendant was prepared under his direction. That when the defendant made the contract for the purchase of the 200 acres, he wanted to purchase the whole, including the 50 acres, on account of a mill-seat and mill thereon, and offered 250 dollars in addition to the 700 dollars to be paid for the 200 acres; but Mrs. *Mann* refused to sell that part, saying it was under a lease to *Cable*, with covenants of renewal and preëmption. That the defendant had entered into possession of the 50 acres, claiming the whole 250 acres under *his deed*, which he refuses to rectify. Mrs. *Mann* died in *September*, 1814.

[* 587]

The plaintiffs prayed for an injunction against the defendant, to prevent waste on the 50 acres; and that he might be decreed to re-convey the 50 acres to the plaintiffs, and deliver up the possession, and account for the rents and profits, &c.

The defendant, in his answer, denied that he had a lease of 200 acres of the lot, when he purchased; but said that he occupied 100 acres, for which he paid rent to the heirs of *Brewerton* and to Mrs. *Mann*, but had no written lease. He stated that the residue of the lot, when he purchased it, was occupied by several other tenants, one of whom was *Cable*, whose lease, he did not believe, contained more than 15 acres; that in *June*, 1804, he applied to Mrs. *M.* to purchase the 100 acres, at three dollars per acre, but she refused to sell less than the whole lot; that being urged by her, he offered to buy the whole for 750 dollars, she giving him a bond of indemnity against the improvements of the

1817.

GILLESPIE
v.
MOON.

[* 588]

tenants, which she refused. That afterwards, at her request, he called to see her, and she offered to sell the lot for 700 dollars, to be secured by bond and mortgage, and the defendant to pay the rents in arrear, being about 50 dollars, which offer, she said, she was induced to make by the advice of *D. D. Tompkins*, Esq. as received from *John W. Gibson*, her attorney. That on the 9th of *June*, the defendant accepted the proposal of *Mrs. M.*, and he paid her the arrears of rent, including six dollars for *Cable*, and took a receipt, dated *June 9*, 1804, "in full, for the rent of the lot 57, occupied by *J. M.*," the defendant. That the deed and the bond and mortgage were to be drawn, and ready for delivery, on the 1st of *July*. He denied that the deed was drawn under his direction, and alleged that it was drawn by *Gibson*, the attorney for *Mrs. M.*, who copied the description from the deed to her, and by her direction, and that she took the advice of *G. & J. Brewerton*, as to her power to give a deed for the lot with warranty. He admitted the contract as stated in the bill, but said it was intended to be for the whole lot; but as neither party knew the quantity of acres the lot contained, it was agreed that it should be described as containing 200 acres, more or less; but that the deed should be for the whole lot, whether more or less. That the deed was acknowledged by *Mrs. M.* the 29th of *June*, but was not sent to the defendant, until the autumn of 1804. That the premises were described as "a tract of land in the provincial patent, in the county of *W.*, known and distinguished by lot No. 57, bounded, &c., (as in the deed to *Mrs. M.*) containing 200 acres, more or less." That on receiving the deed, possession of the whole was delivered to him by the tenants, to each of whom he offered a deed, on their paying the rent in arrear, and a proportionable part of the purchase money; that he offered a deed on the same terms to *Cable*, who refused the offer, and voluntarily surrendered to the defendant the part of the lot in his possession. That the defendant continued in peaceable possession of the lot, until the death of *Mrs. Mann* and of *James Brewerton*, by whom he could have proved the agreement as above stated. That the defendant has made improvements on that part of the lot which was leased to *Cable*, to the amount of *four thousand* dollars, and that no rent had been demanded of, or paid by the defendant. The defendant denied that he offered *Mrs. M.*, for the 50 acres, an additional sum of 250 dollars, or any other sum, except as above stated; and he denied all fraud or mistake in regard to the deed, and averred, that the whole lot was intended to be conveyed to him by *Mrs. M.*

The cause being put at issue, ten witnesses were examined on the part of the plaintiffs, and five on the part of the defendant; as the substance of their testimony is stated in the opinion delivered by the Court *it is unnecessary to detail it at large. The material allegations in the bill appeared to be proved.

1817.

GILLESPIE

V.
MOON.

[* 589]

B. Robinson, for the plaintiffs, having read the original contract and deed from *Mrs. M.* to the defendant, was about to read the depositions taken in the cause, when *Riggs*, for the defendant, objected that parol evidence was not admissible to show the mistake, especially against the answer of the defendant. But the *chancellor* permitted the proofs to be read.

June 26th.

Robinson contended, that the parol evidence showed the mistake, and the subsequent knowledge of it by the defendant, in the clearest and most satisfactory manner. That the variation between the agreement and the deed was, of itself, sufficient to let in the parol proof; and that a mistake in a deed could be proved only by parol. (*Mitford's Pl.* 116. 1 *Vesey*, 317. 457. 2 *Vesey*, 316. 3 *Atk.* 31. 6 *Term Rep.* 631. 6 *Vesey*, 328.)

Riggs and *Mitchell*, contra, insisted, that according to the answer, and the documents exhibited in the cause, there was no mistake in the deed. This was an attempt to alter a deed in its most essential part, by parol evidence. The description of the premises was clear and palpable, and could not be mistaken. Both in the contract and the deed they are mentioned as a tract of land, known by lot No. 57, bounded, &c. There were two bonds and a mortgage given for the consideration, containing the same description, which was thus twice written over, and read by *Mrs. M.* The deed was not acknowledged until 20 days afterwards; yet there was no suggestion of a mistake, at that time, nor when the deed was sent to the defendant, nor for years after. No step was taken by her for relief during all this period. She looked on, in silence, when she knew that the defendant was in possession of the whole lot, and was improving the 50 acres as his own property. This *amounted to an acquiescence. Such gross negligence on the part of *Mrs. M.* would have been sufficient to stop any application for relief, on her part; and it is now, after this long silence and acquiescence, this want of diligence, and such gross negligence, that the plaintiffs seek relief.

[* 590]

Again; parol evidence ought not to be received against the answer of the defendant, who is the only person alive

1817.

GILLESPIE
V.
MOON.

who was present and knowing to what was intended by the parties, at the time. In *Jackson*, ex dem. *Burr*, v. *Shearman*, (6 *Johns. Rep.* 19.) the Supreme Court held, that the acknowledgment of a party, as to title to real property, is a dangerous species of evidence, and though admissible to support a tenancy, or to satisfy doubts as to the nature and character of a possession, yet to admit it as evidence of title, would counteract the beneficial purposes of the statute of frauds. Courts have, in various instances, adhered, with the utmost strictness, to the rule, excluding parol evidence to alter or vary a written instrument, on account of the very dangerous consequences of such evidence; (2 *Vesey*, 195. 6 *Vesey*, 333. *Dickens*, 295. 1 *Bro. Ch. Cas.* 92. 338. 1 *Black. Rep.* 1202. 1 *Johns. Ch. Rep.* 598, 599. 12 *Johns. Rep.* 427.) and admitting it only to rebut an equity, where the plaintiff seeks relief resting in the discretion of the Court, or a part performance of an agreement, or alleges fraud. There is no case to be found, where parol evidence has been received to enforce an equity. The rules of evidence on this subject are the same in law and equity. The principles of policy are the same in both Courts. (1 *Johns. Ch. Rep.* 343. 429, 430. *Sugd. L. of V.* 90. 100. 4 *Bro.* 515. 6 *Vesey*, 328. 3 *Atk.* 98. 387. *Phillips's L. of Ec.* 454.) There is no adjudged case allowing a plaintiff to give parol evidence to vary the terms of a written instrument, on the ground of mistake or surprise. There are, it is true, some dicta of Lord Hardwicke and Lord Thurlow, which seem to countenance the admission of such evidence, but *they have not been regarded as authority. "It must never be forgot," says Lord Eldon, (6 *Vesey*, jun. 334. 339.) in remarking on these dicta, "to what extent the defendant, one of the parties, admits or denies the intention;" and in the same case, (the Marquis *Townsend* v. *Stangroom*,) he observed, that upon the evidence, without the answer, he might not have had so much doubt whether he ought not to rectify the agreement upon which S. relied, as to take time to consider whether the bill should be dismissed; but taking the evidence, in reference to the answer, which denied the agreement, the bill was dismissed. Though Lord Thurlow, in *Irnham* v. *Child* (1 *Bro. C. C.* 92.) said, that "if the mistake was admitted, it would not overturn the rule of equity, by varying the deed, but it would be an equity *dehors* the deed; yet he adds, that it should be proved as much to the satisfaction of the Court as if it were admitted; and the difficulty of this is so great, that there is no instance of its prevailing against a party insisting that there was no mistake." Now, what is the evidence in this case, which is to satisfy

[* 591]

the Court as much as if the mistake was admitted? The whole of it consists in the testimony of witnesses to *parol* declarations and confessions of the *defendant*, made 13 years before. (Here the counsel went into examination of the evidence.) This Court, in *Marks v. Pell*, (1 *Johns. Ch. Rep.* 594. 598.) considered evidence of the mere naked confessions of the party, uncorroborated by other evidence, as insufficient to support the charge, that the deed was intended as a mortgage; and in that case, even, the bill charged that the defendant's testator fraudulently destroyed the certificate of the defeasance. Most of the cases where *parol* evidence has been given to show mistake, will be found, also, to be cases of fraud. In this case, as in that of *Marks v. Pell*, there are no facts or acts of the party corroborating the declarations or confessions proved.

But admitting the *parol* evidence, the plaintiffs certainly *came too late, after so many years had elapsed, during which they have not questioned the correctness of the deed, nor sought relief against the alleged mistake.

If, however, the Court should think the plaintiffs entitled to relief, they ought to compensate the defendant for his improvements.

Harison, in reply, relied on the case of *Townsend v. Stangroom*, in which Lord *Eldon*, after examining all the cases with his usual caution, admitted the *parol* evidence. He did not, he said, rely on the *obiter dicta* of Lord *Hardwicke* and Lord *Thurlow*; for they expressed a deliberate opinion, after looking into the cases, that relief might be had against a deed or instrument, founded in *mistake*; that such mistake could be shown by *parol*. and that the admission of such evidence was not contradicting the instrument.

The defendant's answer is contradictory, and is proved, even by his own witnesses, not to be true, in some particulars; and the maxim *falsus in uno, falsus in omnibus*, may be applied to it. All the parties here, from the outset of the transaction, *knew* that the lot contained 250 acres. It was the duty of Mrs. *M.*, as a *trustee*, to sell in parcels. She was not obliged to sell the whole lot at once. The contract shows most clearly that it was her intention to sell the 200 acres only. It is not pretended, that mere uncorroborated confessions are sufficient. But there are, in this case, many facts and circumstances, which go to confirm the evidence, as to those confessions. The only question is, whether the Court is satisfied, from all that appears, that there was a mistake.

If there was a mistake, the defendant knew that he was

1817.

GILLESPIE
V.
MOON.

[* 592]

1817.

GILLESPIE
v.
MOON.

September 30th.
[* 593]

not entitled to the 50 acres, and made his improvements, conscious of wrong. He has no equitable claim to be paid for them.

The cause stood over for decision, until this day.

*THE CHANCELLOR. The bill is brought to rectify a mistake in the conveyance to the defendant, which, by an error in the description of the land, conveyed the whole lot, or 250 acres, instead of 200 acres, parcel of the same. The mistake is positively denied in the answer; and it is objected, that parol proof of the mistake is inadmissible, in opposition to the plain language of the deed, and especially, in opposition to the defendant's answer.

1. Assuming the parol testimony to be competent, the fact of the mistake, on the part of the grantor, is made out to my entire satisfaction. There are circumstances, independent of the parol proof, that afford pretty strong presumptive evidence of mistake. The deed to Mrs. Mann, in 1799, after mentioning the number and describing the boundaries of the lot, adds, that it *contains 250 acres, more or less*. The defendant lived on part of the lot, and other tenants occupied other parts of it, at the time of the purchase by the defendant, and the number of acres was a fact likely to be known by the several persons interested in the lot. It is not pretended in the case, that the lot did not contain 250 acres, and when the defendant applied to purchase, it is extremely probable that he and Mrs. Mann equally well knew so important and so notorious a fact, as the number of actual or reputed acres. But the agreement for the purchase, signed by both of them, on the day of the date of the deed, stated that Mrs. Mann had agreed to convey to the defendant, a *tract of land containing 200 acres*; and the deed itself, which follows, in the description of the boundaries, the words of the former deed to Mrs. Mann, adds, *containing 200 acres, more or less*. Why did it vary, in this particular, from the former deed, and not follow the description throughout? This was a circumstance which would probably attract attention, as soon as the other parts of the description. A purchaser being on the lot, and well acquainted with it, would ordinarily attach much importance to a declaration of the *quantity* of acres. If the whole lot was intended to have been sold, it is inconceivable why that part of the description, in the former deed, should have been varied in so great a degree, as from 250 to 200 acres, and why the previous agreement, in writing, should speak of a *tract of land of 200 acres*, instead of the *lot itself*, well known to contain 250 acres.

460

[* 594]

The two receipts for rents, dated the 8th and 9th of *June*, 1804, do not appear to me to afford much inference, one way or the other. The first receipt was for the payment of the arrears due from the defendant for his 100 acres, and the second for arrears from the other occupants. It says, in full for rent for lot 57, *occupied by defendant*. This was a loose, and very inaccurate expression, and it is difficult to know what was meant. These receipts appear to me to be of no moment in the case.

But if we resort to the parol proof, it is clear and overwhelming, when connected with the inference from the documents, that Mrs. *Mann* did not intend to sell, and that the defendant did not intend to buy, more than 200 acres, and that the 50 acres occupied by *Cable* were not included in the bargain.

Elizabeth Crossby was present when the parties were making the contract, and she remembers that Mrs. *Mann* was positive and absolute in her refusal to sell more than 200 acres, or to sell the part occupied by *Cable*, and that she assigned as a reason, that *Cable* held the land under lease. We have also the testimony of several witnesses residing near the land, and who had been long and well acquainted with the lot and with the defendant, who testify to the great value of *Cable's* part in 1804, and to the confessions of the defendant, after his return from making the purchase at *New-York*, that he purchased 200 acres only, and did not purchase *Cable's* part of 50 acres, but that he found, afterwards, that his deed included the whole lot. The witnesses, who testify to these confessions and *declarations of the defendant, are *Josiah Corbet*, *Jonathan Wood*, *David Brown*, *Caleb Brown*, *Daniel Case*, and *Jonathan Cable*. These six witnesses are all unimpeached; most of them are neighbors to the defendant, and strangers to the plaintiffs, and it is impossible not to give full credit to such a mass of testimony all going to one point. In addition to this, we have the testimony of *David Austin*, who was in *New-York*, with the defendant, in *June*, 1804, and he understood from him, at the time, that his business was to purchase 200 acres of the lot. It is also proved by *Cable*, that the defendant told him, a short time before the purchase, that he was going to purchase 200 acres of the lot.

Some of these witnesses falsify the answer in other parts, and prove it untrue as to a matter of fact within the defendant's own knowledge. The answer says, that immediately on receiving the deed, the possession of the whole lot was delivered to him by the tenants, all of whom either surrendered their possession to him, or took deeds under him, and

1817.

GILLESPIE
V.
MOOR.

[* 595]

1817.

GILLESPIE
V.
MOON.

that he offered deeds to all the tenants, and particularly to *Jonathan Cable*, who refused a deed, and voluntarily surrendered his possession to the defendant. *Cable* not only contradicts the fact of any such offer to, or surrender by him, but it is proved, by *Charles* and *John Blowers*, that the defendant entered forcibly, and took possession of the mill belonging to *Cable*.

[* 596]

2. It is unnecessary to enter more minutely into the parol proof of the fact of the mistake. On that point there is no room for doubt. The only doubt with me is, whether the defendant was not conscious of the error in the deed, at the time he received it and executed the mortgage, and whether the deed was not accepted by him in fraud, or with a voluntary suppression of the truth. That fraudulent views very early arose in his mind, is abundantly proved. He asked *Corbet*, (a witness,) if he could not so *run the line as to save the lower mill seat to himself; and he told *David Brown* that he meant to take counsel, and if he found he could hold the whole lot, he intended to do so, as it was not his fault that the deed was made as it was.

It would be a great defect in what Lord *Eldon* terms the moral jurisdiction of the Court, if there was no relief for such a case. Suppose *Mrs. Mann* had applied for relief, instantly, on discovery of the mistake, and immediately after the delivery of the deed; was there no power in the whole administration of justice competent to help her? It has been the constant language of the Courts of equity, that parties can have relief in a contract founded in mistake, as well as in fraud. The rule in the Courts of law is, that the written instrument does, in contemplation of law, contain the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties, than any that can be supplied by parol. But equity has a broader jurisdiction, and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself. "It must be an essential ingredient," says Lord *Thurlow*, (1 Bro. 350.) "to any relief under this head, that it should be on an accident perfectly distinct from the sense of the instrument." I have looked into most, if not all, of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract, in writing, founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively, by bill, or as a defence.

In *Henkle v. The Royal Exchange Assurance Company*, (1
462

Vesey, 317.) Lord Chancellor *Hardwicke* said, the Court had jurisdiction to relieve, in respect of a plain mistake in contracts in writing, as well as against frauds in contracts. *The same doctrine appears to have been held by him in *Simpson v. Vaughan*, and in *Langley v. Brown*; (2 *Atk.* 31. 203.) and by Lord *Thurlow*, in *Taylor v. Radd*. (cited in 3 *Bro.* 454. 5 *Vesey*, 595.) So, again, in *Baker v. Paine*, (1 *Vesey*, 456.) Lord *Hardwicke* observed, "How can a mistake in an agreement be proved but by parol evidence? It is not read to contradict the face of the instrument, but to prove a mistake therein." In *Irnham v. Child*, (1 *Bro.* 94.) Lord *Thurlow* said, that a mistake creating an equity *dehors* the deed, should be proved as much to the satisfaction of the Court, as if it were admitted; and, afterwards, in *Shelburne v. Inchiquin*, (1 *Bro.* 341. 344.) he held that parol proof was not incompetent to prove that words taken down in writing were, by mistake, contrary to the concurrent testimony of all parties. Lastly, it was said by Lord *Eldon*, in the case of *The Marquis of Townsend v. Stangroom*, (6 *Vesey*, 328.) that it would be very singular, if the jurisdiction of the Court should not be capable of being applied to cases of mistake and surprise, as well as of fraud. He owned that those who undertook to rectify an agreement, by showing a mistake, undertook a task of great difficulty, but he could not say the evidence was incompetent, though it was not possible to reconcile all the cases on this question.

The cases concur in the strictness and difficulty of the proof, but still they all admit it to be competent, and the only question is, Does it satisfy the mind of the Court? Lord *Hardwicke* said, it must be proper proof, and the strongest proof possible; and Lord *Thurlow*, that it must be strong, irrefragable proof; and, he said, the difficulty of the proof was so great, that there was no instance of its prevailing against a party insisting that there is no mistake. We are now considering the question of the competency, and not of the amount of the parol proof, and it appears to be the steady language of the *English* chancery, for the last seventy years, and of all the compilers of *the doctrines of that Court, that a party may be admitted to show, by parol proof, a *mistake*, as well as fraud, in the execution of a deed or other writing.

We will next look into the cases for the application of this principle.

On bills for a specific performance of an agreement in writing, the defendant has frequently been admitted to show, by parol proof, a mistake in such agreement, and by that means, to destroy the equity of the bill. The relief on such bills is said to rest in discretion, and if the defendant can show

1817

GILLESPIE

V.

MOON.

[* 597]

[* 598]

1817.

GILLESPIE
v.
MOON.

surprise or mistake, it makes the special performance of such an agreement unjust. The cases of *Joynes v. Statham*, (3 *Atk.* 388.) *The Marquis of Townsend v. Stangroom*, (6 *Vesey*, 328.) *Rambottom v. Gorden*, (1 *Vesey & Beames*, 165.) *Clowes v. Higginson*, (1 *Vesey & Beames*, 524.) and *Flood v. Finlay*, (2 *Ball & Beatty*, 9.) are all to this point. But this is only one class of cases: there is another class in which the object of the parol proof is to correct mistakes in bonds, deeds of settlements, mortgages, and, generally, in all contracts and agreements, and where the proof is introduced to aid the plaintiff in his bill, as well as to aid the defendant in his defence.

Whether such proof be admissible on the part of a plaintiff who seeks specific performance of an agreement in writing, and at the same time seeks to vary it by parol proof, has been made a question. Lord *Hardwicke*, in *Joynes v. Statham*, seemed to think it might be done; but such proof was rejected by the master of the rolls, in *Woollam v. Hearn*: (7 *Vesey*, 211.) and again in *Higginson v. Clowes*; (15 *Vesey*, 516.) and when Lord *Redesdale* said, in *Clinan v. Cooke*, (1 *Schoales & Lefroy*, 39.) that he could find no decision in which a plaintiff had been permitted to show an omission in a written agreement, by mistake or fraud, he must be understood to refer to the cases of bills for a specific performance of an agreement, which *was the case then before him. There are numerous instances in which the plaintiff has claimed and obtained relief, by showing a mistake in the agreement; and there would be a most deplorable failure of justice, if the mistakes could only be shown and corrected when set up by a defendant to rebut an equity.

[* 599]

In *Henkle v. The Royal Exchange Assurance Company*, the bill was brought by the plaintiff to have a policy rectified, so as to charge the defendants after a loss, and when, without such correction, they would not be charged. The parol proof was admitted, and because the proof was insufficient and uncertain, the bill was dismissed, though without costs. In *Baker v. Paine*, the plaintiff sought, by bill, to be relieved from a mistake in articles of agreement, containing a bargain and sale of goods, and the parol proof was admitted, though objected to, and the articles were rectified. Again, in *Watts v. Bullas*, (1 *P. Wms.* 60.) a voluntary defective conveyance of land was made good, on a bill by a person holding under it, against the heir of the grantor; and in *Simpson v. Vaughan*, (2 *Atk.* 31.) and *Crosby v. Middleton*, (*Prec. in Ch.* 309.) and *Burn v. Burn*, (3 *Vesey*, 573.) a mistake in a bond was shown by parol proof, on the part of the plaintiffs, and the bond amended, though in two of these

cases the obligor was dead, and in the third, the lapse of time had been very great, and the party, against whom the correction was allowed, was a surety. So, in *The South Sea Company v. D'Oliffe*, (cited in 2 *Vesey*, 377. and 5 *Vesey*, 601.) there was a mistake in a bond, given by way of security, by inserting six instead of two months, and the party was relieved, upon evidence of mere verbal communications.

The cases of *Randal v. Randal*, (2 *P. Wms.* 464.) of *Cocking v. Pratt*, (1 *Vesey*, 400.) of *Rogers v. Earl*, (*Dickens*, 294.) and of *Barstow v. Kilvington*, (5 *Vesey*, 593.) were bills filed to rectify mistakes in settlements; and in all of them proof *aliunde* was admitted, though the admission was resisted; and, in two of the cases, by the defendant, who claimed as heir against the mistake.

Defects in mortgages, contrary to the intention of the parties, have also been made good against subsequent judgment creditors, who came in under the party, who was bound in conscience to correct the mistake. (2 *Vern.* 565. 609. 1 *Eq. Cas. Abr.* 320. pl. 1. 1 *P. Wms.* 279.)

It has been said, that there was no instance of a mistake corrected in favor of a plaintiff, against the answer of the defendant, denying the fact of mistake. But I do not understand any of the *dicta* on this point to mean, that the answer, denying the mistake, shuts out the parol proof, and renders relief unattainable, however strong that proof may be. The observations of Lord Eldon, in the case of *The Marquis of Townsend v. Stangroom*, certainly imply no more, than that the answer is entitled to weight, in opposition to the parol proof; but it certainly can be overcome by such proof. In that very case, the answer denied the mistake, yet parol proof was held admissible. The lord chancellor only said, that the evidence must be taken with *due regard being had to the answer*, and that it must not be forgotten, to what extent the answer of one of the parties admits or denies the intention. Lord Thurlow said, that there was so much difficulty in establishing the mistake, to the entire satisfaction of the Court, that it had never prevailed against the answer denying the mistake. I am not inclined, on light grounds, to contradict such high authority, but, as I read the case of *Pitcairn v. Ogbourne*, (2 *Vesey*, 375.) before Sir John Strange, the bill was to be relieved against an annuity bond, and to reduce the sum from 150*l.* to 100*l.*, according to the original understanding and agreement of the parties. The answer denied positively all the circumstances, and every particular of the private agreement, and parol proof, by several witnesses, was objected to and admitted, which falsified

1817.

GILLESPIE
v.
MOON.

[* 600]

1817.

GILLESPIE

v.
MOON.

[* 601]

the answer, and made out the real agreement to the satisfaction *of the Court, and though relief was not granted, it was refused upon other and distinct grounds no ways connected with the question, as to the competency and effect of the proof.

It is the settled law of this Court, as was shown in the case of *Boyd v. M'Lean*, (1 Johns. Ch. Rep. 582.) that a resulting trust may be established by parol proof, in opposition to the deed, and in opposition to the answer denying the trust. There is no reason why the answer should have greater effect in this than in that case, and there would be manifest inconsistency in the doctrines of the Court, if such a distinction existed. The case of *Marks v. Pell*, (1 Johns. Ch. Rep. 598—9.) which was referred to by the defendant's counsel, admitted, that parol proof of mistakes was competent; and it was held not to be sufficient, in that case, because it consisted of naked confessions of a party, made seventeen years after peaceable possession, under a deed. The confessions, in that case, were also of a negative kind, and deduced from tacit acquiescence: the party who made them was dead, and the possession had been, for thirty years, under the deed, and there were no corroborating circumstances in aid of the confessions. Surely there is nothing to be drawn from that case, in opposition to the competency of the proof in this.

We have a strong case on this subject, in *Washburn v. Merrills*, which was decided on the equity side of the Supreme Court of *Connecticut*, in 1801. (1 *Day's Cas. in Error*, 139.) A mortgagor, in that case, made, by mistake, in 1784, an absolute deed, which he did not discover until some time after. The mortgagee got into possession, and, in *March*, 1801, sold to a purchaser, by a deed with covenants of warranty. In *August*, 1801, a purchaser under the mortgagor filed his bill, or petition, against the purchaser under the mortgagee, to redeem. The answer set up the statute of frauds as a defence; and, on the trial, parol *proof of the mistake was offered by the plaintiff, objected to and admitted, and the deed established as a mortgage, and a right of redemption decreed. This decree was afterwards unanimously confirmed, in the Court of Errors of that state.

My opinion, accordingly, is, that the parol proof, in this case, was competent and admissible, and that it establishes, most clearly and conclusively, the fact of the mistake, as charged in the bill.

I am, also, of opinion, that there is no acquiescence here to bar the plaintiffs. Mrs. Mann was but a trustee for one of the plaintiffs, then an infant; and it is in proof, that when she discovered the mistake, she communicated the fact, as

1817.

GILLESPIE
v.
MOON.

early as 1806, to *Joseph Harris*, who called upon her, as agent for the defendant, when she told him of her intention to commence a suit in this Court. She died in 1814, and the present suit, by the *cestui que trust*, was commenced with all due diligence. There is no pretext for the suggestion of any delay, or acquiescence, injurious to the just rights of the plaintiffs. Courts have been liberal on this head. A mistake was rectified, after seven years' acquiescence, in *East v. Thornbury*, (3 P. Wms. 126.) and if Lord *Hardwicke* refused it in *Bell v. Cundall*, (*Amb.* 101.) it was after a lapse of forty-four years, and where there was a purchaser without notice.

Nor has the defendant any equitable claim for compensation for his improvements made upon those fifty acres. They were made by him after he knew of the mistake, and had declared his intention to take advantage of it, and fraudulently carried that intention into effect. Such an allowance would be confounding all moral distinctions, and be giving countenance and sanction to the most flagrant injustice.

I shall, therefore, decree, that the defendant release and convey to the plaintiffs, with proper covenants against *his own acts, the fifty acres leased to *Jonathan Cable*, and possessed by him, and that he pay the costs of the suit.

[* 603]

Decree accordingly.

1817.

BERRY
v.
MUTUAL INS.
Co.

**BERRY and another, administrators of BERRY, *against*
THE MUTUAL INSURANCE COMPANY.**

The *act concerning mortgages* extends to leasehold, as well as to freehold estates.

Priority of registry is of no avail against a previous notice of an unregistered mortgage.

Where several equitable interests affecting an estate are otherwise equal, they will attach according to priority of time.

A second mortgagee, who neglects to have his mortgage registered, will not be relieved against a prior unregistered mortgage, unless he shows, from non-delivery of possession, or other circumstances, that *impossibility* has been or might be practised on him by, or with the concurrence of, the first mortgagee, which could not be detected or guarded against by the exercise of ordinary diligence.

The mere circumstance of leaving the title deeds with the mortgagor is not, of itself, sufficient to postpone the first mortgagee to a second mortgagee, who has taken the title deeds, without notice of the prior encumbrance. There must be fraud, or gross negligence equivalent to fraud, on the part of the first mortgagee.

A subsequent *bona fide purchaser* is expressly protected by the statute, against prior unregistered encumbrances; but a mortgagee is not a *purchaser* within the meaning of the statute.

He may, however, protect himself, by a registry, against a prior unregistered mortgage, without notice.

The statute does not make a registry indispensable. The omission to register only exposes the mortgagee to the hazard of losing his *lien*, in case of a subsequent *bona fide purchaser*, or to the postponement of it to a subsequent mortgage registered.

September 30th.

[* 604]

IN October, 1801, John R. Johnson executed a bond, for 500 dollars, and a mortgage of a lease, for a term of years, of a lot of land in the city of *New-York*, to secure the payment to *Berry*, the intestate. The mortgagee died prior to the 8th of November, 1813, the principal of the *bond, and considerable interest thereon, remaining unpaid; and the plaintiffs were appointed his administrators. The mortgage was not registered until the 12th of March, 1814. The bill stated, that after the execution of the bond and mortgage, the defendants obtained from *Johnson* another mortgage of the same term for years, which had not been registered. That the defendants had possessed themselves of the lease, which had many years to come unexpired, and the rent of which was very small, and had, by sundry mesne assignments, acquired the equity of redemption; but that they concealed the lease from the plaintiffs, &c. The bill prayed for an account, and that the defendants be decreed to pay to the plaintiffs the amount due on the bond and mortgage

to the intestate, or that the residue of the term unexpired might be sold, to satisfy the plaintiffs, and for general relief.

The defendants, in their answer, stated, that *Johnson*, on the 14th of *May*, 1811, being in possession of the lot and of the lease, and no encumbrance appearing on record, offered to assign the lease to them, by way of mortgage, to secure a loan of 2,000 dollars; and the defendants, believing that he had good right to make such assignment, free from all encumbrance, and having no notice of any encumbrance on the premises, lent him the 2,000 dollars, and took his bond for that sum, payable, with interest, on the first day of *November* following, and an assignment of the lease as security, which was delivered over to them. The lease was dated the 10th of *May*, 1796, from *A. Lispenard* to *P. Marseles*, for 66 years, at a peppercorn rent, with a clause of re-entry, &c. The lease was assigned to *Johnson*, and by him assigned and delivered to the defendants. They admitted that they had possession of the premises, and that the equity of redemption was assigned, the 11th of *January*, 1815, by *Johnson* to *J. R. B.*, and by him, on the 30th of *January*, 1815, to *W. W.*, who, on the 1st of *January*, 1816, assigned the same to *the defendants. That the defendants were informed, early in the year 1814, that the intestate had a mortgage on the term, which was before the registry of it, and they then informed the plaintiffs of the lien they had on the lease, and their knowledge of their assignments thereof. The defendants consented to a sale of the residue of the term, or to convey their right to the plaintiffs, and account to them for the rents, on being paid their debt; and insisted that the intestate, by not having his mortgage registered, and suffering *Johnson* to keep possession of the lease, enabled him to impose on the defendants, and that, therefore, the plaintiffs ought to be postponed to the defendants.

The secretary of the defendants, who was examined as a witness, said that the first knowledge which the defendants had of the bond and mortgage of the plaintiffs was in the winter of 1813, when one of the plaintiffs applied for information as to the debt due the defendants, and the security held by them.

The case was brought to a hearing on the 1st of *July* last.

Riggs, for the plaintiffs, contended, that the mortgage to the intestate being first given and first registered, was entitled to a preference. The act concerning mortgages, (1 *N. R. L.* 372. sess. 36. ch. 32. s. 2.) gives the preference to the mortgage first registered; and if made *bona fide*, and for a good consideration, it must be first paid. In *Johnson*

1817.

BERRY
V.
MUTUAL INS
Co.

[* 605]

July 1st.

1817.

BERRY
V.
MUTUAL INS.
CO.

[* 606]

v. *Stagg*, (2 *Johns. Rep.* 510. 521.) the Court of Errors decided, that the second section of the act extended to mortgages of *leasehold*, as well as of freehold estates.

Leaving the lease or title deeds in the hands of the mortgagor is no ground, of itself, for postponing the first mortgagee. There must be circumstances to show fraud on his part. (1 *Fonb. Eq.* 152, 153, 154. note (n.) 6 *Vesey*, 183. 190. 12 *Vesey*, 130.) But there is no pretence *of fraud in this case. In *Beckett v. Cordley*, (1 *Bro. Ch. Cas.* 353. 357.) Lord *Thurlow* said, that "this Court never binds a third person, but where there is notice of a treaty." "There is no case in the books, but where the party to whom the fraud is imputed was consulant of the treaty in which the fraud is practised." The plaintiffs, or their intestate, cannot, in any way, be implicated as party to a fraud, and nothing but actual fraud can divest him of his priority. (2 *Johns. Rep.* 525.) It was so decided by Lord *Thurlow*, in *Tourle v. Rand.* (2 *Bro. Ch. Cas.* 650. 652. *Plumb v. Flint*, 2 *Anst.* 432. S. P.)

If the defendants rely upon their ownership of the equity of redemption, they stand in the place of the mortgagor, and must pay the plaintiffs' mortgage. They must either redeem this mortgage, or waive the equity of redemption. (*Mocatta v. Murgatroyd*, 1 *P. Wms.* 393. 395. 3d *Resol.*)

Boyd, and *Wells*, contra, insisted, that the intestate was guilty of such *gross negligence* in not registering his mortgage, and in permitting the mortgagor to retain the possession of the *lease*, that his mortgage ought to be postponed to that of the defendants. Thirteen years elapsed before the mortgage was registered. A *registry* after the plaintiff had notice of the subsequent mortgage to the defendants, cannot vary the legal or equitable rights of the parties.

In *England*, they have several statutes relative to the registry of deeds in certain counties, which declare deeds not registered void as against subsequent *bona fide* purchasers: yet it has been decided by the *English Courts*, that a person purchasing, with notice of an encumbrance not registered, shall pay, though his deed is first registered. (2 *Bro. P. C.* 425. 2 *Eq. Cas. Abr.* 482. pl. 19. 3 *Atk.* 646. 653. *Sugd. L. of V.* 470, 471.) In *Ireland*, also, they have a registering act, (1 *Sch. & Lef.* 98. 137.) which gives preference to a deed according to the priority of the *time of registry; yet Lord *Redesdale* held, that the priority given by the act applied only to a deed *above exception*. (2 *Sch. & Lef.* 68.)

[* 607]

According to the decision of Lord *Thurlow*, where there
470

is a voluntary concurrence on the part of the first mortgagee, in the mortgagor's retaining possession of the title deeds, he is considered as accessory to the second mortgagee's lending his money, and ought, therefore, to be postponed. The suppression of the truth, as well as the suggestion of a falsehood, so as to cause a prejudice to another who has a right to know the truth, is sufficient, according to the established rules of equity, to postpone the claim of the party who had been guilty of the suppression. (*Coop. Eq. Pl.* 138. 1 *Fonb. Eq.* 154. 1 *Term Rep.* 762. 755.) The result of all the cases on this subject is, that, in order to postpone a prior mortgagee, it is necessary to prove fraud, or actual notice, or *negligence* so gross as to amount to fraud. (2 *Vernon*, 727. note. 6 *Vesey, jun.* 174. 188. *Amb.* 652.) Now, what *grosser negligence* can there be, than what has been shown on the part of the first mortgagee, in this case?

Again; admitting that the plaintiffs and defendants have equal equity, yet the defendants have got the legal estate. In *Head v. Egerton*, (3 *P. Wms.* 280.) Lord Ch. Talbot would not compel the second mortgagee to give up his title deeds, unless the prior mortgagee paid him his money.

The cause stood over for consideration to this day.

September 30th.

THE CHANCELLOR. The equitable rights of the parties, in this case, must have reference to the time when the knowledge of their respective mortgages was communicated to each other, in the winter of 1814, and prior to the registry of the elder mortgage. The subsequent registry by the plaintiffs was of no avail. The rights of the parties had become *fixed*, by means of the *notice*, previously, mutually and concurrently given, and which notice, as *to them, answered all the purpose and object of a registry. Priority of registry never prevails over a previous notice of an unregistered mortgage. (10 *Johns. Rep.* 461, 2.) In considering this case, then, I shall place entirely out of view the fact of the registry. The real point in the case is, which of the unregistered mortgages had the preference in equity, when the information of their existence was given and received.

If there be several equitable interests affecting the same estate, they will, if the equities are otherwise equal, attach upon it, according to the periods at which they commenced; for it is a maxim of equity, as well as of law, that *qui prior est tempore potior est jure*. This rule has been repeatedly declared; (*Clarke v. Abbott*, 2 *Eq. Cas. Abr.* 606. pl. 41. *Bristol v. Hungersford*, 2 *Vern.* 525. *Symmes v. Symonds*, 1 *Bro. P. C.* 66. *Brace v. Marlborough*, 2 *P. Wms.* 492. 495.) and we are to see if there be any thing in this case to prevent the application of it.

1817.

BERRY
V.
MUTUAL INS
CO.

[* 608]

Priority of registry is of no avail against a previous notice of an unregistered mortgage.

Where equitable interests in an estate are, otherwise, equal, they will attach according to priority of time.

1817.

BERRY
v.
MUTUAL INS.
Co.

There is no fraud charged or proved upon the plaintiffs, and if they are to be postponed, notwithstanding they have the elder mortgage, it must be on the ground of culpable negligence, either in leaving the lease with the mortgagor, when they took the mortgage of his term, or in not causing their mortgage to be seasonably registered. I feel strongly disposed to give to these circumstances all the weight to which they can be entitled.

[* 609]

1. It is understood to have been the old rule in the *English* chancery, that if a person took a mortgage, and voluntarily left the title deeds with the mortgagor, he was to be postponed to a subsequent mortgagee, without notice, and who was in possession of the title deeds. The reason of the rule was, that, by leaving the title deeds, he enabled the mortgagor to impose upon others who have no registry to resort to, except in the counties of *Yorkshire* and *Middlesex*, and who, therefore, can only look for their security to the title deeds, and the possession of the mortgagor. *The rule was so understood and declared, by Mr. Justice *Burnet*, in *Ryall v. Rowles*, (1 *Atk.* 168. 172. 1 *Vesey*, 360.) and by Mr. Justice *Buller*, in *Goodtitle v. Morgan*, (1 *Term Rep.* 762.) and there are decisions which have given great weight to the circumstance of the title deeds being in possession of the junior mortgagee. Thus, in *Head v. Edgerton*, (3 *P. Wms.* 279.) the lord chancellor said, it was hard enough upon a subsequent mortgagee, that he had lent his money upon lands subject to a prior mortgage, without notice of it, and, therefore, he could not add to his hardship, by taking away from him the title deeds, and giving them to the elder mortgagee, unless the first mortgagee paid him his money; especially as the first mortgagee, by leaving the title deeds with the mortgagor, had been, in some measure, accessory in drawing in the defendant to lend him money. This case, however, so far from establishing what was supposed to be the old rule of equity, evidently contradicts it, and admits the better title in the first mortgagee. So, in the case of *Stanhope v. Verney*, before Lord *Northington*, (*Butler's note to Co. Litt.* 290. 296. § 13.) the second mortgagee, without notice, had possession of the title deeds, but the chancellor did not give him the preference on that single circumstance, but because he also had got possession of an outstanding term. There does not seem, therefore, to be the requisite evidence of the existence of any such rule in equity, as has been stated by some of the judges; and if there was, a different rule has been since established. It is now the settled *English* doctrine, that the mere circumstance of leaving the title deeds with the mortgagor, is not, of itself, sufficient to postpone

The mere
circumstance
of leaving the
title deeds with

the first mortgagee, and to give the preference to a second mortgagee, who takes the title deeds with his mortgage, and without notice of the prior encumbrance. There must be fraud, or gross negligence, which amounts to it, to defeat the prior mortgage. There must be something like *a voluntary, distinct, and unjustifiable concurrence, on the part of the first mortgagee, to the mortgagor's retaining the title deeds, before he shall be postponed. Lord *Thurlow*, in *Tourle v. Rand*, (2 Bro. 650.) said, he did not conceive of any other rule by which the first mortgagee was to be postponed, but fraud or gross negligence, and that the mere fact of not taking the title deeds was not sufficient; and that if there were any cases to the contrary, he wished they had been named. So the rule was also understood by Chief Baron *Eyre*, in *Thumb v. Fluit*, (2 Anst. 432.) and has since been repeatedly recognized. (Lord *Eldon*, in 6 Vesey, 183. 190. Sir *William Grant*, in 12 Vesey, 130. 1 Fonb. 153. 155. note.) It is admitted, by these same high authorities, to be just, that the mortgagee, who leaves the title deeds with the mortgagor, so as to enable him to commit a fraud, by holding himself out as absolute owner, should be postponed; but the established doctrine is, that nothing but fraud, express or implied, will postpone him.

2. The hardship and abuse complained of in the *English* cases, arise from the want of a general registry act, under which a second mortgagee can always secure himself. I believe there are no registry acts in *England*, except in certain counties, as *Yorkshire* and *Middlesex*; and the provision in such cases, (see stat. 3 and 4 Ann, ch. 4.) is similar to that in our act concerning mortgages, and gives the subsequent purchaser, or mortgagee, the preference, if the memorial of his deed be first registered. It has been decided, in *Johnson v. Stagg*, (2 Johns. Rep. 510.) that our act concerning the registry of mortgages extends to leases for years, assigned by way of mortgage; and that the leaving of the lease with the mortgagor, was no evidence of fraud, because the registry of the mortgage was a beneficial substitute for the deposit of the deed, and gave better and more effectual security to subsequent mortgagees. *The registry of the mortgage is notice; and if the first mortgagee neither takes the title deeds, nor registers his mortgage, he only exposes himself, and not the subsequent purchaser, or mortgagee. The statute expressly secures the bona fide purchaser, and it equally enables the subsequent mortgagee to secure himself, by registering his mortgage.

We have seen that the leaving the title deeds with the mortgagor is no prejudice to the first mortgage; and there

1817.

BERRY
V.
MUTUAL INS.
Co.

[* 610]

a mortgagor, is not, of itself, sufficient to postpone the first mortgagee, to a second mortgagee, who has taken the title deeds, without notice of the prior encumbrance.

There must be fraud, or gross negligence, equivalent to fraud, to postpone a first mortgagee to a second mortgagee without notice.

[* 611]

The registry of a mortgage is a substitute for the deposit of the title deeds.

A subsequent bona fide purchaser is ex-

1817.

BERRY
v.
MUTUAL INS.
Co.

pressly protected by the statute against prior unregistered encumbrances; and a subsequent mortgagee may protect himself by a registry of his mortgage.

The statute, however, does not make a registry indispensable. The omission of a registry only exposes the mortgagee to the hazard of losing his lien, in case of a subsequent *bona fide* purchaser, or to the postponement of it to a subsequent registered mortgage.

A mortgagee is not a purchaser within the meaning of the registering act.

is the less necessity for it with us than in *England*, because, with us, the creditor who subsequently, and without notice of any prior unregistered mortgage, deals with the mortgagor, can always protect himself in the easiest and most effectual manner; and, supposing he omits to do it, by a misplaced confidence in the mortgagor, has he any equitable claim to be preferred to a prior mortgagee, who, under the same misplaced confidence, has equally omitted to do it? This is the turning point in the present case.

The first mortgage was valid without registry. The statute does not render a registry indispensable. The omission of the registry only exposes the mortgagee to the hazard of a loss of his lien by a subsequent *bona fide* purchase, or to the hazard of a postponement of his lien to a subsequent registered mortgage. A second mortgage will not, *per se*, and without registry, gain a preference. There is no such principle to be deduced from the statute, and there is no reason or necessity for it in the nature of the case. The reason why a *bona fide* purchaser is expressly excepted from the operation of an unregistered mortgage is, that he could not otherwise deal with safety, and would be exposed, even with the utmost vigilance, to the frauds of the mortgagor. The act does not provide for the registry of his deed, but only for the registry of mortgages, and gives them a preference according to the *priority of the registry. The second mortgagee protects himself by his registry, but the purchaser does not, and cannot; and, therefore, the statute declares that his deed shall absolutely prevail over the unregistered mortgage. The statute of 3 and 4 *Ann*, relative to the west riding of *Yorkshire*, provides for the registry of deeds and mortgages promiscuously, and, therefore, places them upon an equal footing.

Though, in one sense, every mortgage is a purchase, yet the mortgage act evidently speaks of purchasers, in the popular sense, as those who take an absolute estate in fee. There is no pretext for considering a mere mortgagee as a purchaser, within the meaning of the second section of the *act concerning mortgages*.

I have not been able to discover any principle of law or equity that will enable me to say, that the first mortgage is to be deprived of its advantage of priority of time. The omission to register the mortgage was not capable of producing any mischief to third persons, who would use ordinary diligence and precaution. The defendants ought not to charge a negligence upon the plaintiffs of which they have been equally guilty. It was their own fault or folly that they were not protected. They trusted to the assurances of the

mortgagor that his land was unencumbered ; and the plaintiffs trusted equally in the mortgagor, that he would not, afterwards, sell or mortgage the land. It is a common rule, say the books, that where of two persons, equally innocent, or equally blamable, one must suffer, the loss shall be left with him on whom it has fallen ; and here comes in the other rule, that the equities being otherwise equal, the priority of time must determine the right.

It is very clear that the first mortgagee was not bound to register his mortgage, because the law makes it valid, *as between the parties, without registry. The registry is only a matter of precaution, and the statute has provided against all the mischief of the omission. If the party will not avail himself of the means of safety provided by statute, he cannot expect that this Court will grant him further aid, and especially against a party whom he charges with no fraud. If relief is ever given in any case, on the ground of policy, or constructive fraud, against the sale or mortgage of property, it is because, from the non-delivery of possession, or from other circumstances, *imposition* had or might have been practised, which could not be detected or guarded against by the exercise of ordinary diligence. No such ground for relief exists in this case.

I am, accordingly, of opinion, that the plaintiffs are entitled to relief, according to the prayer of their bill, and that the defendants are either to account to them for the amount due on their bond and mortgage, or that the residue of the term be sold for the satisfaction of their debt. The costs of suit are to be paid out of the property mortgaged.

Decree accordingly.

475

1817.

BERRY
V.
MUTUAL INS.
Co.

[* 613]

A second mortgagee, who neglects to have his mortgage registered, will not be relieved against a prior unregistered mortgage, unless from the non-delivery of possession, or other circumstances, *imposition* has been practised on him, which could not be detected or guarded against by the exercise of ordinary diligence.

1817.

LUPTON
v.
LUPTON.

***S. LUPTON and E. PEARSALL against W. LUPTON
and others.**

The *real estate* is not charged with the payment of legacies, unless the intention of the testator to that effect is expressly declared, or clearly to be inferred from the language and dispositions of the will.

The usual clause devising all the rest of his real and personal estate, not before devised, is not sufficient to show an intention to charge the real estate; nor is the mere direction, that all debts and legacies are to be paid. But if the real estate be devised, "after payment of debts and legacies," it is charged with the payment of them. Though the real estate be charged, yet the personal estate is the proper fund for the payment of debts and legacies, and is to be first applied, before charging the real estate.

If an executor pays one legatee, and there is, afterwards, a deficiency of assets to pay the others, the legatee so paid must refund a proportionable part. But if the deficiency of assets has been occasioned by the *waste* of the executor, the legatee who is paid may retain the advantage he has gained by his legal diligence, as against his co-legatees, but not against a *creditor*.

A legatee may compel an executor to bring into Court money in his hands, or to give security, where the legacy is payable at a future day.

A legacy, payable at a future day, does not carry *interest* until after it is payable, unless it is given to a *child*, and the parent, by the will, has made no other provision for its maintenance. But this exception, it seems, does not extend to *grandchildren*.

An executor, against whom a bill has been taken, *pro confesso*, in a suit by legatees, is a competent witness for the other defendants or devisees.

It seems, that a guardian *ad litem*, is a competent witness, he being, at most, liable only for *costs*, which are not of course, but discretionary, and according to circumstances.

September 30th.

THE plaintiffs, who were the children of *Brandt Schuyler Lupton*, deceased, and the *grandchildren* of *William Lupton*, deceased, and *legatees* under the will of the said *William Lupton*, filed their bill against the defendant *W. Lupton*, as executor, and against the other defendants, who are children, and immediate representatives of *Lancaster* and *Elizabeth Lupton*, deceased, two of the children of the testator, and devisees under the same will. The testator, *William Lupton*, deceased, being seised and possessed of real and personal estate, on the 20th of *November*, 1794, *made his last will, which, after directing the payment of debts, and giving to his wife the use of the personal estate, and the rents and profits of all the real estate, during her widowhood, in lieu of dower, contained the following clause: "I give and bequeath unto each of my three *grandchildren*, *William*, *Samuel*, and *Eliza Lupton*, (the children of my late son, *Brandt Schuyler Lupton*,

[*615]

1817.

LUPTON
V.
LUPTON.

ton, deceased,) as soon as they shall respectively attain to the age of twenty-one years, the sum of five hundred pounds, and the further sum of five hundred pounds each, when they shall respectively arrive to the age of 25 years." And the testator, after devising certain lands to his said three grandchildren, &c., which, in case of their death, without lawful issue, should go to his three children, *William, Lancaster*, and *Elizabeth*, declared as follows: "and my will is, that my said grandchildren shall, after my decease, be maintained and educated at the discretion of my executors, out of the interest, rents, and profits of the estate herein before bequeathed and devised to them, until they respectively arrive unto lawful age. *Item*, after the decease or marriage of my said wife, I give, &c. unto my three children, *William, Lancaster*, and *Elizabeth*, but not until my said daughter *Elizabeth* shall arrive at full age, all the rest, residue, and remainder of my real and personal estate, not herein before already devised and bequeathed, their heirs and assigns, forever, equally to be divided," &c. And the testator appointed *John Chase*, *John Ellis*, and his two sons, *William* and *Lancaster*, executors. The testator's wife, children, and grandchildren, all survived him, and *Elizabeth*, the youngest grandchild, had, some time since, attained the age of 25 years. *Lancaster Lupton*, one of the sons of the testator, married *Francis P. Townsend*, and died, leaving her a widow, encient of a daughter, his only child, who is still living, and a minor. *Elizabeth*, the testator's daughter, married *John B. Johnson*, now deceased, by whom she had three children, *Maria*, *William L.*, and **Samuel R.*, who are infants, still living; and she afterwards died intestate. *John Ellis*, one of the executors, declined proving the will, which was proved by the other three executors. *Lancaster Lupton*, one of the executors, afterwards died, and the bill charged, that the three executors, after the death of the widow of the testator, took possession of the personal estate, and either converted the same to their own use, or wasted it, or distributed it among the children of the testator, or their immediate representatives, regardless of the legacies bequeathed to the testator's grandchildren, and without providing for their maintenance and education. That the plaintiff *S. L.* was about seven years old, and the plaintiff *E. P.* about five years old, when their grandfather, the testator, died, and were entitled, during their respective minorities, to the rents and profits of real estate devised to them, and to the interest of the respective sums bequeathed to them, to be applied towards their maintenance and education; and that the same ought to have been raised by the executors, out of the testator's per-

[* 616]

1817.

LUPTON
v.
LUPTON.

[* 617]

sonal estate, and that if that was not sufficient, out of his residuary real estate; but that the same has never been raised or applied to the benefit of the plaintiffs; that *W. L.*, one of the grandchildren, had received the five hundred pounds bequeathed to him; that the executors and the representatives of *Lancaster L.* and *Elizabeth L.* had, by means of partition, under the act of the legislature, sold, and converted into money, all the real and personal estate of the testator, and appropriated the same to their own use, without regard to the rights of the plaintiffs, without paying for their maintenance and education, and leaving the whole of the said second or further sum of five hundred pounds, payable to *S. L.*, on his attaining the age of 25 years, and the interest thereon, and part of the sum of five hundred pounds, bequeathed to *E. P.*, to be paid on her coming to the age of 21 years, and the whole of the sum of five hundred pounds bequeathed to her, to be paid to her *on her arriving at 25 years, with the interest thereon, unpaid. That the real estate, bequeathed to the plaintiffs, had yielded no rents or profits during their minority; or, if it had, it had not been applied to their benefit; and that *John Chase*, one of the executors, had died insolvent and intestate, and no person had administered on his estate. The bill prayed, that *W. Lupton*, the surviving executor, might either admit assets sufficient to satisfy the claims of the plaintiffs, or give a true account thereof, &c.; and that the administrators of *Lancaster Lupton* might admit assets, &c., or account for the same, &c.; and that the defendants, or such of them to whom it belongs, might come to an account with the plaintiffs for their legacies, and that what should be found to be due to them, on such accounting, might be paid out of the personal estate of the testator; and if that was not sufficient, out of his real estate.

The defendant, *W. Lupton*, the only surviving executor of the testator, suffered the bill to be taken *pro confesso* against him.

The defendant *Maria L.*, (an infant daughter of *Elizabeth*, one of the children of the testator,) having, since the filing the bill, married *Evan M. Johnson*, they put in their joint and several answer; and the defendant *F. P. Lupton*, the widow of *Lancaster Lupton*, deceased, and her infant daughter, by her guardian, *C. Wright*, also put in their separate answers; but as the bill was dismissed as to all the defendants, except *W. L.*, the executor, who was ordered to pay the balance due to the plaintiffs, it is unnecessary to state the answers further. Replications were filed to the answers, and proofs taken in the cause.

It appeared by the testimony of *Peter Roosevelt*, who was

examined as a witness for the defendants, that he had, in 1808, as the next friend and *guardian ad litem* of the children of *Elizabeth Johnson*, instituted a suit in this Court, in their behalf, against the executors and others, for an account and settlement of the estate, and by an order of the *Court, the accounts were referred to a master, and that the plaintiffs had notice of the suit; that *William Lupton*, the executor, rendered his account, which was discussed before the master, and the three children of *Elizabeth* (defendants) were charged with their proportions of the legacies of the plaintiffs, and of the expenses of the executors in maintaining and educating the plaintiffs, and the same was deducted from their proportions of the testator's estate; but the executors were not required to account for the time previous to the death of the widow of the testator; and the legacies coming to the plaintiffs were retained, by *William Lupton*, out of the proceeds of the sale of the real estate, which was known to the plaintiffs, who were informed, at the time, of the taking of the account, and of the amount of their legacies being so retained by the executor, to whom they were to look for payment.

William Lupton, the executor, one of the defendants, was also examined as a witness for the other defendants. He stated that the testator, at the time of his death, owed little or nothing; that the personal estate was sufficient to pay all the debts and legacies, which amounted to 7,500 dollars. That he and his brother *Lancaster* were the sole acting executors, and the whole personal estate came into their hands, each one receiving a part, and without accounting to each other, and on the death of *L.*, the assets in his hands unadministered, were delivered over to the witness. That the plaintiffs were maintained out of the estate, by the executors, until they came of age, except during the short time the plaintiff *E.* was married; that the expenses of their maintenance was equal to the interest of the legacies; that the real estate was sold under the partition, and one third of the proceeds was received by the witness, as heir. That in the account rendered before the master, in the suit brought in behalf of the infant children of *Elizabeth Johnson*, the witness kept back the legacy payable to *S. L.* at the age of 25, and the two sums payable *to *E. L.* That *S. L.*, after he arrived at the age of 25, knew of the fact, and accepted the bond of the witness for the legacy payable in three years. That in his account he charged the representatives of *Lancaster L.* and *Elizabeth Johnson*, who are the other defendants, with their proportion of the said legacies, and for the maintenance and education of the plaintiffs, the amount of

1817.

LUPTON
V.
LUPTON.

[* 618]

[* 619]

1817.

LUPTON
v.
LUPTON.

which, with their assent, he retained in his hands. That the plaintiffs were not 25 years of age, when the accounts were taken in the chancery suit, nor were their rights or interests implicated in that suit; but they knew, after they arrived at 25 years of age, of the settlement with the other defendants; and he paid *Elizabeth P.* the first 500 pounds, excepting a very small part, and gave his bond to *S. L.*, which he accepted, for the legacies due him, as above stated. That the witness was, in *July*, 1811, and since has been, unable to pay all the legacies.

Riggs, for the plaintiffs, contended, 1. That the legacies to the grandchildren were given out of the estate of the testator; and the defendants were only entitled to the residue of the estate, after those legacies were paid; that no direction being given to pay the legacies out of the personal estate, they were a charge on the land. The devise of the real estate was subject to this charge, and the devisees are bound to see the legacies paid. The plaintiffs were not, therefore, obliged to look exclusively to the executors. They might take what he could give, and exhaust the remedy against him, before calling on the devisees. (*Brudenell v. Boughton*, 2 *Atk.* 268. *Joy v. Campbell*, 1 *Sch. & Lef.* 328. 344.)

2. That residuary legatees, leaving a legacy in the hands of an executor or trustee, who fails to pay, are themselves answerable to creditors. (*Carsey v. Bashan*, decided by Lord *Hardwicke*, in 1753, cited by Lord *Redesdale*, in *Joy v. Campbell*, 1 *Sch. & Lef.* 344.)

[* 620]

*3. Younger children, as to the provisions for them by will, are regarded as creditors, and may pursue the assets. (*Uvedale v. Halfpenny*, 2 *P. Wms.* 151.)

4. That the executor giving his bond to one of the plaintiffs for the legacy due to him, did not extinguish his right to seek payment from the other devisees, out of the estate of the testator.

S. Jones, jun., and *I. L. Riker*, contra, contended, that the legacies were *pecuniary*, not *specific*; (*Wilson v. Brownsmith*, 9 *Vesey*, 180. *Lambert v. Lambert*, 11 *Vesey*, 607.) and the plaintiffs were not entitled to a greater portion of interest on them than was sufficient for their maintenance. Legacies payable at a future day do not carry interest, unless where the bequest is by the father to a child, and no other provision is made for the child's support. (*Ellis v. Ellis*, 1 *Sch. & Lef.* 1—5. *Van Bramers v. Hoffman's Executors*, 2 *Johns. Ch. Cas.* 200.) The expense of the

maintenance of the plaintiffs, as appears from the testimony of *W. Lupton*, was fully equal to the interest.

The testator did not intend to make these legacies chargeable on his *real* estate. There are no words used which manifest that intention, unless, perhaps, in the clause devising all the real and personal estate not before devised; but these words are not to be understood as meaning the residue, after debts and legacies are paid; (2 *Atk.* 626. n. *Haslewood v. Pope*, 3 *P. Wms.* 323. *Forrester v. Leigh, Ambler*, 173.) the widow had the whole estate for life, which must first expire before any part of the real estate could be applied to pay the legacies. If the real estate is at all liable, it can only be after the personal estate is exhausted. When both the real and personal estate are charged with the payment of legacies, the legatees must look first to the *personal* estate. (4 *Vesey*, 542. 5 *Vesey*, 149. 461. *Prec. in Ch.* 392. 3 *Atk.* 201. 1 *Bro. Ch. Cas.* *144.) There was, in this case, *personal* property amply sufficient to pay all the debts and legacies; and if any *deficiency of assets* has arisen from the *waste* of the executors, the devisees, who are also legatees, are not responsible, or bound to refund. (1 *Pere Wms.* 459. *Walcott v. Hall*, 2 *Bro. Ch. Cas.* 305. 2 *Fonbl. Eq.* 371. note (p.) 2 *Eq. Cas. Abr.* 7. 1 *Munf. Virg. Rep.* 440.) Besides, after the whole *fund* had been raised out of the estate, and gone into the hands of the executor, or trustee, the estate was discharged, and the legatees must look to the executor for the money. (5 *Vesey*, 736. 1 *P. Wms.* 518. *Salk.* 153.) The defendants had no notice of the insolvency of the executor, at the time, and cannot be liable to the plaintiffs for the application of the money in the hands of the executor. If they had sued him, he would have had a right to retain the amount demanded by the plaintiffs. Again, if the plaintiffs lose their legacies, it is owing to their negligence, and a want of due diligence, which will preclude them from any relief against the defendants. They might have filed their bill against the executors, and have compelled them to give security for the legacies, or to pay the assets which had come to their hands, into Court. (*Ambler*, 273. 1 *Bro. Ch. Cas.* 105. 1 *Ch. Cas.* 121.) Considering the defendants in the light of sureties, they must, under the circumstances of this case, be considered as discharged by the acts of the plaintiffs. (2 *Vesey, jun.* 542. 3 *Atk.* 91. *Cas. temp. Finch*, 26.)

The deposition of *W. Lupton*, the executor, who has suffered the bill to be taken, *pro confesso*, against him, is good evidence for the other defendants. Having admitted that he has received the assets, and is bound to pay the legacies, he

1817.

LUPTON
v.
LUPTON.

[* 621]

1817.

LUPTON

v.

LUPTON.

[* 622]

is indifferent between the parties. (1 *Phill. Ev.* 53. 2 *Johns. Rep.* 934. 3 *Johns. Rep.* 420. 4 *Johns. Rep.* 126. 2 *Mass. Rep.* 106.)

*The deposition of *Roosevelt*, the guardian *ad litem*, is also admissible evidence. (2 *Dickens*, 781. 3 *Atk.* 604. *Phill. Ev.* 57. 2 *Str.* 1217.)

Riggs, in reply, said, that *interest* was payable on the legacies, and the evidence did not show that it had been all applied to the maintenance of the plaintiffs. That from the accounts and proofs in the cause, it appeared that the defendants had received some of the personal estate. The plaintiffs were not bound to wait for the death of the widow, for the payment of their legacies; they might, when the legacies were due, have applied to this Court for a sale of the reversion of the estate. The suit by the infant children of *E. J.* against the executors, in which the alleged account and settlement was made, was not an adversary suit, and the plaintiffs were not parties to the settlement, or implicated in the suit. A bond, *per se*, does not extinguish a legacy. The defendants left no money in the hands of *W. Lupton*, to pay the plaintiffs.

THE CHANCELLOR. The right of the plaintiffs to recover their legacies from any of the defendants, except *W. Lupton*, the executor, will depend upon the decision of these two points:—

1. Whether the legacies were a charge upon the real estate:

2. Whether the executor who received, and afterwards wasted them, and charged them, on a settlement with the other representatives of the testator, is not exclusively responsible.

Distinction between pecuniary and specific legacies.

[* 623]

1. The legacies were not specific, but common pecuniary legacies. This character of them cannot well be mistaken. (9 *Vesey*, 180. 11 *Vesey*, 607.) The testator bequeaths the sum of 500 pounds to each of the plaintiffs, when they attain the age of 21, and the like sum to each of them, when they attain the age of 25. These legacies *have been partly paid by the executors, but the amount now due is not material on the questions raised. The only part of the will that gives any color to the construction that these legacies were intended to be a charge upon the land, is the clause which gives the residuary estate to the defendants, or those under whom they claim, and which is in these words: "I give, devise and bequeath, &c. all the rest, residue, and remainder of my real and personal estate, not herein before already devised or bequeathed."

This clause does not appear to me to afford evidence of an intention to charge the land with these pecuniary legacies.

The real estate is not, as of course, charged with the payment of legacies. It is never charged unless the testator intended it should be, and that intention must be either expressly declared, or fairly and satisfactorily inferred, from the language and disposition of the will. This general rule does not seem to admit of dispute. If that residuary clause created such a charge, the charge would have existed in almost every case, for it is the usual clause, and a kind of *formula* in wills. It means, only, when taken distributively, *reddendo singula singulis*, that the rest of the personal estate, not before bequeathed, is given to the residuary legatees, and that the remainder of the real estate, not before devised, is in like manner disposed of. It means that the testator does not intend to die intestate as to any part of his property, and it generally means nothing more.

When the real estate is charged, and not in the most explicit and direct terms, it is usually done in terms that indicate a pretty clear intention that the legacies were, at all events, to be paid. Thus, where the testator devises the real estate, *after payment of debts and legacies*, as in *Tompkins v. Tompkins*, (*Prec. in Chan.* 397.) and in *Shallcross v. Finder*, (3 *Vesey*, 738.) or where he devises the real estate, after a *direction that debts and legacies be *first paid*, as in *Holt v. Vernon*, (*Prec. in Ch.* 430.) and in *Williams v. Chitty*, (3 *Vesey*, 545.) the real estate has been held to be charged. It is not sufficient that debts or legacies are directed to be paid. That alone does not create the charge, but they must be directed to be first, or *previously* paid, or the devise declared to be made *after* they are paid.

There is no such language here, and the plaintiffs are driven to rely on the residuary clause. Sir *Joseph Jekyll* (3 *Atk.* 626. note,) said, that when the testator said, *all the residue of my personal estate I give*, he meant the *residue* of what he had not before specifically devised, and not the residue after debts paid.

In *Brudenell v. Boughton*, (2 *Atk.* 268.) the testator gave pecuniary legacies, and then devised the remainder of his estate, real and personal, *after payment of his just debts and legacies*; and Lord Chancellor *Hardwicke* held, that the latter words created a charge upon the land, as a collateral security, after the personal estate had been applied and exhausted. This decision was in conformity with all the cases; but the case contains some further observations, for it appears that the testator had revoked that will, and by another, gave pecuniary legacies to the same persons, reduced one half, and

1817.

LUFTON
v.
LUFTON.

The real estate is not charged with the payment of legacies, unless so expressly declared by the testator, or that intention is clearly deducible from the language and dispositions of the will.

The usual clause devising the residue of real and personal estate, not before devised, does not imply that the real estate is to be charged.

If the real estate is devised, "after payment of debts and legacies,"

[* 624]
it is then charged with them.

A mere direction to pay debts and legacies does not create a charge on the real estate.

1817.

LUPTON
v.
LUPTON.

[* 625]

then added, "I give to *S.* all the rest of my estate, real and personal." The chancellor thought, upon the whole, and after some difficulty, that the legacies in the latter will were, also, a charge; and though the case wants some perspicuity, yet it appears to me to be evident that the two wills were taken and compared together in drawing that conclusion. Lord *Hardwicke* said, that he considered the legacies under the second will, as part of the money given by the first, only new modelled, or qualified, or equally a charge. We have no reason to conclude, that if the intention to charge the land with those legacies had not distinctly and clearly appeared in the first will, that he would have deemed the legacies a charge on the real estate by the words of the second will. The prior will, here, gave a construction to the latter. So, in *Hannis v. Packer*, (*Ambler*, 556.) the real estate was well charged by the devise of the residue of the real and personal estate after payment of debts and legacies, and the testator there, by a codicil unwitnessed, desired the devisees to give 200*l.* to *B.*, and this legacy in the codicil, though not charged there, was held to be charged by force of the prior will.

But it is sufficient to cite the case of *Keeling v. Brown*, (5 *Vesey*, 359.) to show that the construction of this residuary clause is perfectly well settled. The will there directed the debts and funeral expenses to be paid, and then devised several parts of his real estate. The testator then gave pecuniary legacies, and, "as to all the rest, residue, and remainder of his estate and effects whatsoever, whether real or personal," he gave and devised it to *B.* It was agreed by the counsel on both sides, that the legacies were not charged upon the real estate, and the master of the rolls considered it to be a point exceedingly clear.

It appears to me, that a decision on this point settles the case, and that if the real estate was not charged, the devisees of that estate are not to be disturbed. But it may be inferred from the proof, that these defendants, on a settlement with the executor, took some small part, a *scintilla*, of the personal estate, sufficient to call them to an account. I am inclined to think, however, from the facts in the case, that the plaintiffs are bound, at all events, under any construction of the will, to look exclusively to the executor.

An executor
against whom
the bill has been
taken *pro confesso*, in a suit
by legatees, is
a competent

[* 626]

2. As *William Lupton*, the executor, has suffered the bill to be taken *pro confesso*, and admits himself to be answerable for the legacies claimed, he has no interest in the questions between the other parties to the suit. He has received the amount of the legacies, and is bound to refund, either to one party or the other. He, therefore, *stands indifferent, or, at 484

least, he has no interest in the success of the defence, and is a competent witness for the defendants. I should rather think that *Roosevelt*, the guardian *ad litem*, is also a competent witness. (*Dickens*, 781. *Wyatt's P. R.* 419.) He can only be liable for costs, and that is a matter of discretion, and depends upon the fact of misbehavior. When infants are sued, some person must appear for them, *ad litem*. It is an act of necessity and good will, and such a guardian is not, of course, chargeable with costs, though the defence should fail. He has no certain and fixed interest in the cause. But the question on his competency is not material, for the same facts which he testifies to are proved by others.

The substance of the testimony, in reference to the second point, is, that the testator left no debts, and that the personal estate which came to the hands of the executors, was equal, and more than equal, to the payment of the legacies. That the plaintiffs, during their respective minorities, were principally supported and educated by the executors; that the real estate in the city of *New-York* was sold under the partition act, and the proceeds divided among the devisees. That, on a settlement between *William Lupton*, the surviving executor, and the other defendants, as residuary legatees under their parents, those defendants were charged with their proportion of the legacies due the plaintiffs, and of the expenses of their maintenance and education, and the amount was retained by the executors, with the assent of the defendants. This settlement puts an end to the claim of the plaintiffs on any other person than the executor.

There is a distinction, running through the cases, between an original deficiency of assets, and where the assets were sufficient, but had been wasted by the executor. In the former case, a legatee, who has been paid more than his proportion, under the deficiency, must refund; but in the latter case, he is not obliged to, for he has received no more than what was due to him, and the other legatees must look to the executor. The legatee, who has been paid, shall retain the advantage of his legal diligence. This rule was so laid down by Sir *Joseph Jekyll*, in 1 *P. Wms.* 495. (*anon.*) but it does not apply where a creditor, instead of a legatee, is in question. On a waste by the executor, a legatee who has been paid, must refund in behalf of a creditor. (*Eyre*, chief baron, in *Hardwicke v. Mynd*, 1 *Anst.* 112. *Anon.* 1 *Vern.* 162.) But the authorities stop here; and the case of *Walcott v. Hall*, (2 *Bro.* 305.) is such a clear and solemn adjudication on this point, as to place it beyond all further controversy. There was a legacy, in that case, of 50*l.* given to the plaintiff and payable at the age of 21, and the interest,

1817.

LUPTON
v.
LUPTON.

witness for the other defendants, or devisees.

It seems, that a guardian *ad litem*, is a competent witness, he being, at most, liable for costs only, and that not of course, but in the discretion of the Court, according to the circumstances.

If an executor pays one legatee, and there is, afterwards, a deficiency of assets to pay the others, the legatee, so paid, must refund a proportionable part of what he has received.

But if the deficiency of assets has been occasioned by the waste of the executor, the legatee who is paid shall retain the advantage gained by his legal diligence; yet, in

1817.

LUPTON

v.
LUPTON.

favor of a creditor, he must refund.

in the mean time, to be applied to his maintenance. The residue of the personal estate was given to the defendants. The executor retained the legacy for the plaintiff, and paid over the residue to the residuary legatees, and then became a bankrupt. On a bill filed against the executor, and the residuary legatees, Lord *Kenyon*, who was then master of the rolls, declared that the residuary legatees were not liable: for they had received no more than they were entitled to, and the party must rest on the *devastavit*, and he dismissed the bill. This case is very much in point, and is, of itself, decisive.

A legatee may compel the executor to bring into Court money in his hands, or to give security, when the legacy is payable at a future day.

A legatee, who uses due diligence, can usually secure himself, and a co-legatee ought not to suffer for his negligence, or stand security for an executor. The Court of Chancery will no doubt, (and cases to this point were referred to by Lord *Thurlow*, in 1 *Bro.* 105.) on proper application, compel an executor to bring in money acknowledged to be in his hands, or give security for a legacy, payable at a future day. There is a case, in 1 *Salk.* 153, (which was referred to by Baron *Graham*, in *Omerod v. Hardman*, 5 *Vesey*, 736.) and also the case of *Morgan v. Morgan*, cited in 2 *Eq. Cas. Abr.* 7., both of which were cases in the house of lords, in which it was decided, *that if trustees waste a fund raised out of the real estate to pay debts and legacies, or if executors waste a fund out of the personal estate, the real estate, in the one case, is not to be charged with a burden which it has borne once, and in the other, it is said, that the heir is not to suffer for the *devastavit* of the executor.

[* 628]

The personal estate is the proper fund to pay debts and legacies, and is to be first applied, though the real estate be charged.

The personal estate is the proper fund to pay debts and legacies, and in general it is first to be applied, though the real estate may be charged.

There is then, no foundation, on any view of the subject, for the suit against any of the defendants, except *William Lupton*, the executor; and the bill, as to the rest of them, ought to be dismissed; and following the case of *Walcott v. Hall*. I shall dismiss the bill without costs. But the plaintiffs are entitled to such decree as their bill will warrant, against *William Lupton*; and, as they may wish to take a decree against him, there must, in that case, be a reference, to ascertain the precise amount of the legacies due, with interest from the times they were respectively payable. With respect to the question of interest, it may be proper to observe, that the general rule is, that a legacy payable at a future day does not carry interest, until after it is payable, unless it be a legacy to a *child*, payable at a future day, and the child has no other provision, nor any maintenance, in the mean time, allotted by the will. If there be no such provision,

A legacy, payable at a future day, does not carry interest, until after it is payable; unless in the case of a legacy to a *child*, where the parent has made no other provision for its maintenance.

the legacy carries interest immediately, on the presumption that the parent must have intended that the child should, in the mean time, be maintained at his expense; but this implication is destroyed, if any provision, however small, be made for maintenance. (Lord Redesdale, in *Ellis v. Ellis*, 1 Sch. & Lef. 5. Lord Hardwicke, in *Hearle v. Greenbank*, 3 Atk. 716. *Harvey v. Harvey*, 2 P. Wms. 21. *Crickett v. Dolby*, 3 Vesey, 10.) But the better opinion, or rather the weight of authority is, that even this humane presumption does not apply to the case of grandchildren, and that there *must be something special in the will, for that purpose, in case of a grandchild, or a legacy payable at a future day, will not carry interest. (*Houghton v. Harrison*, 2 Atk. 329. *Butler v. Freeman*, 3 Atk. 58. Lord Eldon, in 6 Vesey, 546. and *Van Bramer v. Executors of Hoffman*, 2 Johns. Cas. 200. and the case cited in 1 Sch. & Lef. 5. against the opinion of Lord Alvanley, in 3 Vesey, 12. and the doubt expressed in 12 Vesey, 23.) In this case there is no pretence for interest, *eo nomine*, before the legacies were due, but a maintenance was directed out of the interest and rents of the estate given them, and beyond such a reasonable maintenance, at the discretion of the executors, they were not entitled.

The bill was accordingly dismissed as to all the defendants, except *William Lupton*, without costs, and a decree, as to him, that he pay the balance of the legacies due, with interest, from the times they were payable, together with the costs of the suit, as against him, and that a reference be had to a master, to ascertain the amount due.

The following decree was entered:—

“That the plaintiffs’ bill stand dismissed, as against all the defendants, except the defendant *William Lupton*, without costs, &c.; and that the plaintiffs are entitled to recover from the defendant *W. L.* the arrears of the legacies devised to them respectively, in and by the last will and testament of their grandfather, *William Lupton*, deceased, and in the pleadings set forth with interest thereon, from the times the said legacies respectively became payable, and the costs of this suit to be taxed; and for the purpose of ascertaining how much is due to the plaintiffs respectively, for the legacies bequeathed as aforesaid, and the interest thereon, it is further ordered, that it be referred to a master in chancery, to ascertain, compute, and report what is due to the plaintiffs, and to each of them, for the legacies aforesaid, and the interest thereon to be computed as aforesaid, and that the *master report thereon with all convenient speed. And, inasmuch as the said defendant *W. L.* has not appeared to the plaintiffs’ bill, nor defended this suit, and the plaintiffs are, therefore, entitled to proceed before the master, *ex parte*,

1817.

LUPTON
v.
LUPTON.

But it seems, that this exception does not extend to the case of a grandchild.

[* 629]

[* 630]

1817.

LYMAN
V.
UNITED INS.
Co.

it is, therefore, further ordered, that upon the master's report being filed, the same may be confirmed in eight days, by an order to be entered for that purpose, unless the said *W. L.* shall appear before the master, *gratis*, and shall also, within the said eight days, show cause against such confirmation, by filing exceptions thereto; and that, if the said report shall be filed and confirmed as aforesaid, then the plaintiffs may proceed, and have their costs of this suit taxed, and they shall then be entitled to execution, jointly or separately, against the said *W. L.*, for the amount of the said master's report, with interest thereon from the date of the same, and the costs of this suit to be taxed as aforesaid, according to law, and the course of this Court."

LYMAN AND LYMAN *against* THE UNITED INSURANCE
COMPANY.

Equity will not interpose to amend a written instrument, (as a policy of insurance,) without the clearest and most satisfactory proof of the mistake, and of the real agreement between the parties, especially where the mistake is denied in the answer.

September 30th.

[* 631]

THE bill was filed to have a policy of insurance corrected and amended. The plaintiffs, in *February*, 1813, were partners in trade, and made the following application to the defendants for insurance: "What will be the premium of insurance on the brig *Union*, at and from this to **Oporto*, with a cargo of corn; at and from *Oporto*, to the *Cape de Verd Islands*, for a cargo of salt; and at and from said *Islands* to her port of discharge in the *United States*, free from *British capture*? The said brig will sail under a *Portuguese* royal passport. What return, provided the risk ends at *Oporto*? And, also, what the premium would be, against all risks, the voyage round? The policy, to (the plaintiffs or) whomsoever it may concern. A valued policy. Value 5,000 dollars. *New-York, February 15th, 1813. J. & E. Lyman. N. B.* The brig *Union* lately belonged to *James Robinson*." The bill stated that war existed between the *United States* and *Great Britain*. That peace existed between *Portugal* and *Great Britain*, and that the *Portuguese* royal passport was intended as a cover against capture by the enemy, the

plaintiffs being citizens of the *United States*. That the policy was made out, as the plaintiffs supposed, according to the terms of the representation, and was left with the defendants. That on calling for the policy, about 10 days after the vessel sailed on her voyage, the 24th of *February*, 1813, they discovered that it contained a description of the vessel as *American*, which, they are advised, amounts to a warranty, that she should sail with *American papers*. That the policy was returned to the defendants, with a request that they would alter it, and insert a clause, that the vessel should sail with a *Portuguese royal passport*, but the defendants refused to make any alteration in the policy. The bill prayed that the policy might be amended, so as to contain a clause permitting the vessel to sail with such a passport.

The defendants, in their answer, said, that they knew that the plaintiffs were *American* citizens, and they understood and believed they were owners of the brig, and that she was duly documented as an *American* vessel, and had no idea that the *passport* would be inconsistent with her *American* character; or that it was the intention of the plaintiffs to represent her as *Portuguese*, and as a cover from *capture. That being warranted free from *British* capture, *Great Britain* being the only enemy of the *United States*, any such device, to protect her, was not necessary for the defendants, though it was important that she should not have a document that would give her a national character of a belligerent. That the policy truly expressed the terms of the agreement between the parties, and the defendants meant the vessel should sail as *American*, and with such papers only as an *American* vessel might use. That the plaintiffs asked the defendants, what additional premium they would demand, for altering the policy, so as to insure her, as sailing with *Portuguese papers*, and the defendants answered five per cent., which the plaintiffs refused to give.

The secretary of the defendants said the policy was filled up according to the terms of the written application. At the bottom of the written application, the defendants made the following memorandum: "Free from embargo risk out—five per cent.—Clause No. 2.—Account of themselves, and whom else it may concern."—

T. A. Emmet, and *Woodward*, for the plaintiffs.

S. Jones, jun., for the defendants.

THE CHANCELLOR. The difficulty in this case arises from the want of the requisite evidence of any agreement of the

1817.

LYMAN
V.
UNITED INS.
CO.

[* 632]

1817.

LYMAN
V.
UNITED INS.
CO.

† *Ante*, p. 585.

[* 633]

parties, different from that contained in the policy. The cases which, treat of this head of equity jurisdiction, require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the Court. The authorities were reviewed in the decision in the case of *Gillespie and wife v. Moon*,† and a reference was made to the successive opinions of Lord *Hardwicke*, Lord *Thurlow*, and Lord *Eldon*, (1 *Vesey*, 317. 1 *Bro.* 94. 6 *Vesey*, 328.) *in favor of the most demonstrative proof, especially against the answer denying the mistake.

In the present case, we have not any parol proof that the *United Insurance Company* ever did agree to any other contract of insurance than that contained in the policy. The witnesses examined on the part of the plaintiffs, were not present at any conversation or agreement. They give us only general information and belief; and they know nothing of any agreement between the parties, different from that which the policy contains. The only circumstance on which the plaintiffs can place any reliance, to show that the company had agreed to the proposals, in respect to the *Portuguese* passport and *Portuguese* character of the vessel, in other words, to the disguise and deception at which the plaintiffs aimed, is the *memorandum* at the foot of the plaintiffs' proposals. But it appears to me, that this note is far too vague and uncertain to justify any correction of the policy. It was not subscribed by the company, nor by their authority. It appears to be only heads of conversation and inquiry on mere fugitive points, which were lost and merged in the execution of the formal instrument. It was the duty of the plaintiffs to have resorted to that instrument, as soon as it was drawn, to see whether the parties understood each other. There is no evidence that this *memorandum* was returned by the company, as the *terms* agreed to by them. Not a witness alludes to it. The clerk, who was examined, says, that the policy was filled up according to the terms agreed to by the company, and returned by them; and so says, also, the answer of the secretary to the company. And what were these terms? No one says that the notes at the foot of the proposals were the terms, nor for what purpose they were made. All this is left to conjecture and inference. The notes are not sufficiently full and intelligible to make out any policy, *in extenso*, from them. It does not appear to which alternative part of the proposals they alluded. *The policy itself, to which we are to look for the terms, according to the answers, and to the testimony of *Jones*, the clerk, contained special stipulations; as, for instance, against *American* captures, not mentioned in the proposals, nor al-

[* 634]

luded to in the notes, and to which no objection was made by the plaintiffs. To alter a clear written contract of the parties, without any parol proof to warrant the new agreement, and when the charge of mistake is denied in the answer, and denied by a witness present; and to do this upon no other foundation than such an imperfect *memorandum*, *obscuris vera involvens*, would be destructive to the certainty and safety of written contracts.

There is no case that goes such lengths; no amendment was ever made, without absolute conviction of the truth and precision of the real agreement. Here is no, or, at least, not sufficient, evidence that the defendants ever did agree to any other terms of insurance than those expressed in the policy. The bill must, consequently, be dismissed; and I am willing that it should be without costs, as was done by Lord *Hardwicke*, in one of the cases referred to, on the ground that here may have been a misapprehension between the parties in the formation of their contract.

Bill dismissed.

491

1817.

 LYMAN
 V.
 UNITED INS.
 CO.

END OF THE CASES.

INDEX.

A.

ABATEMENT.

Of suit, *vide* ALIEN.

Of nuisance, *vide* NUISANCE, 2.

ACCOUNT.

1. To sustain a bill for an *account*, there must be *mutual demands*; not a single matter, but a series of transactions on one side, and of payments on the other. *Porter v. Spencer*, 169
2. A defendant will be ordered to account for moneys overpaid, in pursuance of a usurious contract. *Dey v. Dunham*, 191
3. A party cannot surcharge and falsify an account, unless upon the ground of mistake, or error distinctly charged. *Stoughton v. Lynch*, 210

Interest, how to be calculated on a running account, *vide* INTEREST.

Vide ASSIGNMENT, 8. CONTRIBUTION, 6. DEBTOR AND CREDITOR, 2. EXECUTOR AND ADMINISTRATOR, 2. NE EXEAT REPUBLICA. PARTNERSHIP, 5, 6, 7, 8. USURY, 1.

ADMINISTRATION.

Vide EXECUTOR AND ADMINISTRATOR, I.

ADMINISTRATOR, (PUBLIC.)

Vide EXECUTOR AND ADMINISTRATOR, I. 3, 4.

ADULTERY.

On a bill for a divorce, a feigned issue, to try the truth of the adultery, will not be awarded, unless the adultery is specifically charged, and with that degree of certainty as to time, place, &c., as may enable the defendant to meet the fact at the trial. *Codd v. Codd*, 22.

AGREEMENT.

- I. *Construction, effect, waiver of, and rescinding agreement.*
- II. *Specific performance.*

I. *Construction, effect, waiver of, and rescinding agreement.*

1. A subsequent decision of the Court of Errors, in a different case, giving a different exposition of a point of law from the one declared by the Supreme Court, when the parties to a suit entered into an agreement relative to such suit, can have no retrospective effect, so as to destroy the operation of such agreement. *Lyon & Brockway v. Richmond and others*, 51
2. A written agreement may be

waived by parol. *Botsford v. Burr*, 405

3. By an agreement, made in April, 1815, A. covenanted with B. and C., directors and agents of a manufacturing company, to make certain machinery, in one year, at a certain price, to be paid in instalments. On the 1st of August following, B. and C. gave notice that the company could not go on, and that the contract was abandoned; and A. (the covenants being independent) brought an action at law against B. and C., to recover the instalments due before the 1st of August. The Court refused to stay the suit at law, by injunction, until the amount of compensation justly due to A., for the work he had done, could be ascertained by a master, or by an issue of *quantum damnificatus*; the plaintiff's right of action at law being clear and certain, and the amount of the instalments sued for, appearing, from the answer of A., not to exceed an adequate compensation for the materials found, and work done by him towards the fulfilment of his contract, on the 1st of August. *Skinner v. Dayton and others*, 526

4. It seems that one party alone cannot rescind a contract; and if A. had gone on, notwithstanding the notice from B. and C., and completed the machinery according to his contract, and tendered it to them, whether he would not be entitled to demand the full sum stipulated to be paid? *Quare. ib.*

II. *Specific performance.*

5. Inadequacy of price, though not so gross as to amount to fraud, may be a sufficient ground for refusing to enforce a specific per-

494

formance of a contract of sale. *Osgood and others v. Franklin and others*, 23

Specific performance of contract between husband and wife, *vide* *BARON AND FEME*, 7.

Vide EVIDENCE, II. 20.

ALIEN.

That a suit was brought by the plaintiff, as trustee for an alien enemy, is no objection after the war, as the suit was not abated during the war, and the disability is merely temporary. *Hamersley v. Lambert and others*, 508

AMENDMENT.

Vide PRACTICE, IV. 20.

ANSWER.

Vide PLEADING, III.

APPEAL

1. An appeal does not lie for costs merely. *Eastburn & Daines v. Kirk*, 317
2. An appeal interposed after a decree for a sale is essentially executed, does not supersede the completion of the purchase. *Executors of Brasher v. Cortlandt*, 507

APPRAISEMENT.

Vide AWARD, 4. 8, 9.

ARBITRATION.

Vide AWARD.

ASSIGNMENT.

1. A creditor, to whom his debtor has assigned property, as security for advances and responsibilities, with an agreement that, if the property is not redeemed within a certain time, the assignee may sell it, to pay and indemnify himself, may, after the expiration of the time limited, sell the property for his indemnity; and may, with the assent of the debtor, become the purchaser thereof, and of all the equitable or residuary interest of the debtor, at a fair and adequate valuation; and such purchase, if made *bona fide*, and without intent to injure or defraud creditors, will be valid, not only against the debtor, or *cestuy que trust*, but against all other persons. *Hendricks v. Robinson and others*, 283
2. Where *F.*, a debtor in embarrassed circumstances, made an assignment (absolute on its face) of personal property to *W.*, a creditor, as security for a new loan of money, and for existing claims, and also for his indemnity against existing and future engagements, especially all such as should arise in the management of the property assigned; and *W.*, for the purposes of the assignment, effected a loan of money from *P.*, on condition of guarantying to him a debt due to him, from *F.*, to be paid out of the proceeds of the property so assigned; it was held that *P.*, by lending his money to *W.* on this guaranty, acquired an equitable *lien* on, and was entitled to be paid his debt out of, the proceeds of the property in the hands of *W.*, in preference to other creditors. *ib.*
3. The assignee, under such an assignment, is entitled to his commissions on the sale of the prop-

erty, according to the stipulation contained in the assignment, unless the allowance is so disproportionate and extravagant as to afford evidence of fraud. *ib.*

4. The assignee of a *chose in action* takes it subject to all the equity of the original obligor, or debtor, at the time, but not to a latent equity residing in a third person, against the obligee or assignor. *Murray & Winter v. Lyburn and others*, 441
- S. *P. Livingston v. Dean and others*, 479
5. To subject him to the equity of a third person, he must have express or constructive notice of it, at the time of the assignment. *Livingston v. Dean and others*, 479
6. Where *B.* obtained from *L.* a deed for land, through fraud, in which *H.* was concerned, and *B.* afterwards confessed a judgment to *H.*, who assigned it to *R.* for a valuable consideration, and without notice of the fraud, it was held that, the deed to *B.* being null on account of the fraud, the judgment created no valid lien on the land; that *R.* took the assignment at his peril, and subject to all the existing rights of the debtor; and the land was decreed to be reconveyed, discharged from the judgment, and a perpetual injunction awarded. *Livingston v. Hubbs and others*, 512
7. An assignment by a debtor of all his property, in trust, to pay the trustees, and such other creditors as the debtor, in one year, by deed, might direct and appoint, &c., reserving a power to appoint new trustees, and to revoke, alter, add to, or vary the trusts, at his pleasure, is fraudulent and void. *Riggs and others v. Murray and others*, 565
8. The trustees, under such deed, were decreed to account for the

proceeds of the property received by them under the assignment, with interest, deducting their commissions and charges; and to be entitled only to come in, *pari passu*, with the other creditors, for their ratable proportion of the debtors' estate. *Riggs and others v. Murray and others*, 565

9. Though assignments in trust, with a power of revocation, may be good in family settlements, yet a power of revocation, reserved by a debtor, in an assignment of his property to pay certain creditors, renders the instrument fraudulent and void. S. C. 576

AWARD.

1. In the case of an award, this Court will not interfere, unless there has been fraud, imposition, or mistake. *Shepard v. Merrill & Tucker*, 276
2. Where the matter submitted was, what damages the one party or the other was to pay on the surrender of a lease, and the arbitrators awarded a sum to be paid by the lessor to the lessee, but did not take into consideration the rent payable at the next quarter day, considering that matter as not in controversy, or submitted; nor was it mentioned or brought before them by the parties; it was held that there was no mistake in the award. *ib.*
3. Where the parties, by mutual consent, withdraw a cause from the Court, before hearing, for the purpose of settlement by arbitrators, and on certain terms, one of which was, that "the question of costs in the chancery suits, being original and cross suits, should be submitted to the chancellor," the Court will not decide the mere question of costs, but leave each

496

party to pay his own costs. *Eastburn & Downes v. Kirk*, 317

4. Where a lease contains a covenant, that the mills and other buildings erected on the premises by the lessee, should, at the end of the term, "be appraised and valued, by two persons indifferently chosen by the parties, and, in case of their disagreement, by a third person chosen by the two;" a nomination by each party of one appraiser, with the assent of each to the nomination of the other, is binding on them, and a compliance with the covenant. *Underhill v. Van Cortlandt and others*, 339
5. Where an umpire is chosen by two arbitrators, and they join in the umpirage, it is good; for the umpire may take what advice or assessors he pleases. *ib.*
6. What misconduct of arbitrators is a sufficient ground for setting aside an award. *ib.*
7. If there is no corruption or partiality in arbitrators, nor any misconduct during the hearing, nor any fraud practised by either party, the award is binding and conclusive, and cannot be set aside by the Court, however unreasonable or unjust the award may appear. *ib.*
- S. P. *Todd v. Barlow*, 551
8. Arbitrators, in appraising property, are not bound to assess the value of each particular article separately. *Underhill v. Van Cortlandt and others*, 360
9. An award will not be set aside for an over or under valuation of property appraised. S. C. 361
10. How far a gross and palpable mistake may be a ground for setting it aside? *Quare*. S. C. 364
11. In an action at law on an award, the corruption or misconduct of the arbitrators is no defence. S. C. 366

12. It seems that the testimony of an arbitrator is inadmissible to impeach his award. S. C. 349
13. When there is no charge of corruption or misconduct in arbitrators, and the award on the face of it is final, nothing *dehors* the award can be pleaded, or given in evidence, to invalidate it. *Todd v. Barlow*, 551
14. An award will not be opened, or set aside, on the allegation of the discovery of a receipt which had been lost or mislaid, so that it could not be produced before the arbitrators, to show a payment, unless under very special circumstances, and satisfactory proof of all due efforts to discover the receipt before the hearing, or to supply its loss, and of its discovery since the award. *ib.*

B.

BAIL.

Vide NE EXEAT REPUBLICA.

BANK.

1. The right of banking was formerly a common law right belonging to individuals; but since the restraining act of the legislature, it is a franchise derived from the legislature. *Attorney-General v. Utica Insurance Company*, 377
2. Carrying on banking operations contrary to the statute, is not such a mischief or public nuisance, that this Court would grant an injunction to restrain the party, even if it had jurisdiction over public nuisances, which, it seems, it has not. S. C. 379

VOL. II.

63

BAILMENT.

If a person, having charge of the property of another, so confounds it with his own, that it cannot be distinguished, he must bear all the inconvenience of the confusion; if he cannot distinguish and separate his own, he will lose it; and if damages are given to the plaintiff, the utmost value of the article will be taken. *Hart v. Ten Eyck and others*, 62

Vide PLEDGE.

BARON AND FEME.

1. Where a husband asks the aid of the Court to enable him to get possession of his wife's property, he must do what is equitable, by making a reasonable provision out of it, for the maintenance of her and her children. *Howard and wife v. Moffatt*, 206
2. And whether the husband applies himself, or a suit for the wife's debt, legacy, portion, &c., is brought by the legal representatives of her husband, the rule is the same. *ib.*
3. The extent of the provision will depend on the circumstances of the case. *ib.*
4. The practice is for the husband, on a reference, to make proposals of a settlement before the master, and, on the coming in of his report, the Court judges of its sufficiency. *ib.*
5. But if the husband can lay hold of the property of the wife, without the aid of the Court, he may do it, this Court not having power to enforce a settlement, by interfering with his remedies at law. *ib.*
6. A husband and wife may contract, for a *bona fide* and valuable con-

497

sideration, for a transfer of property from him to her. *Livingston v. Livingston*, 537

7. Where husband and wife agreed, by parol, that he should purchase a lot in her name, and build a house thereon, and that he should be reimbursed the cost thereof out of the proceeds of another house and lot, of which she was seised, which should be sold for that purpose; and, the husband having executed the agreement on his part, the contract failed by the sudden death of the wife, who left infant children, to whom the legal estate in both lots descended; the agreement was decreed to be carried into effect, and the lot was ordered to be sold, and a conveyance executed by the infant trustees, by their guardian *ad litem*; and their father, (the plaintiff,) and the master, were directed to join in the conveyance; and the plaintiff to be reimbursed his advances, out of the moneys arising from the sale. *ib.*
8. Though such conveyance by the husband to the wife is presumed, in the first instance, to be intended as an advancement and provision for her, yet that presumption may be rebutted by parol proof. *ib.*

Process against husband and wife, *vide* PRACTICE, I. 1.

When wife may put in a separate answer, *vide* PLEADING, III. 18.

Vide DIVORCE. SUPPLICAVIT.

BILL.

Vide PLEADING, 2.
498

C.

CERTIORARI.

A certiorari is no *supersedeas* to an execution already executed. *People v. Goodhue*, 200

CHOSE IN ACTION.

Vide ASSIGNMENT, 4, 5.

COMMISSIONS.

Vide ASSIGNMENT, 3, 8. USURY, 3.

CONFUSION OF GOODS

Vide BAILMENT.

CONTRIBUTION.

1. Equity will not interpose to enforce a *contribution* between *wrong doers*, especially where they do not stand in equal right, or there is not equal equity between them. *Peck v. Ellis*, 131
2. Contribution is allowed only between defendants standing in *equali jure*. S. C. 136
3. There is no contribution between joint trespassers, at law. *ib.*
4. Nor, it seems, in equity. *ib.*
5. The representatives of a deceased partner who has paid the whole of a partnership debt, will be substituted in the place of the creditor, in order to recover his portion from the survivor. *Sells v. Administrators of Hubbell*, 397
6. But if the surviving partner allege that a balance was due to him from the deceased, as much or more than he had been obliged to pay, an account must be taken,

before the Court can interfere to enforce the claim for contribution. S. C. 398

CONVICTION.

Vide HABEAS CORPUS, 1.

CORPORATION.

1. There is no particular form of words requisite to create a corporation. *Denton and others v. Jackson and others*, 324
2. Persons may have corporate powers for certain specified purposes only. S. C. 325
3. The loan-officers and supervisors of a county are corporate bodies. *ib.*
4. The several towns in this state are legal communities, or bodies politic for certain purposes. *ib.*
5. Whether this Court has jurisdiction or control over corporations in respect to breaches of trust, unless in the case of a charitable institution? *Quære. Attorney-General v. Utica Insurance Company*, 384
6. Whether this Court has a visitatorial power or superintending jurisdiction over corporations, civil, eleemosynary, or charitable? *Quære. S. C.* 386
7. But the persons who exercise the corporate powers may, in their character of trustees, be accountable in this Court for a fraudulent breach of trust. S. C. 389

COSTS.

- I. *Costs in general.*
- II. *Staying proceedings until payment of costs in another suit.*

I. *Costs in general.*

1. On a bill by the heirs of D. against

the heirs, &c. of P., for a specific performance of an agreement, it appearing that there was no improper behavior or unjustifiable defence, the defendants were not decreed to pay costs. *Dyer's Heirs v. Potter's Heirs, &c.* 152

2. Costs in this Court are discretionary. *Executors of Getman v. Beardsley*, 274
3. And if executors, administrators, or heirs, bring groundless and vexatious suits, they will be ordered to pay costs. *ib.*
4. Where the parties, by mutual consent, withdraw a cause from the Court before hearing, for the purpose of a settlement by arbitrators, and on certain terms, one of which was, that "the question of costs in the chancery suits, being original and cross suits, should be submitted to the chancellor," the Court will not decide the mere question of costs, but leave each party to pay his own costs. *Eastburn & Downes v. Kirk*, 317
5. Costs rest in the sound discretion of the Court, to be exercised upon a full view of all the merits and circumstances of the case. *ib.*
6. A rehearing is not granted for costs only, except in special cases. *ib.*
7. Nor will an appeal lie for costs merely. *ib.*
8. Where a purchaser, *pendente lite*, had no actual notice of the pendency of the suit, costs were not decreed against him. *Murray & Winter v. Lyburn*, 441
9. A plaintiff will not be allowed to dismiss his bill without costs, unless it appears that he had reasonable grounds for filing it. *Perine v. Swaim and others*, 175

II. *Staying proceedings until payment of costs in another suit.*

10. Proceedings in a suit in this 499

- Court, will not be stayed, on motion, until the costs in certain suits at law, between the same parties, relating to the same subject, in which the plaintiffs had been nonsuited, or verdicts found against them, be paid. *Demarest and wife v. Wynkoop and others*, 461
11. The rule applies only when both suits are in the same Court; or, at least, in Courts of the same nature, and proceeding in the same manner, and on the same principles, either at law or in equity. *ib.*

COVENANTS OF TITLE.

Vide VENDOR AND PURCHASER, 3, 4.

CROSS BILL.

Vide EVIDENCE, III. 28. 30. PLEADING, II. 13.

D.

DAMAGES.

Measure of damages, *vide* BAILMENT.
TRUST AND TRUSTEE, III. 20, 21.
22. Stipulated damages, *vide*
JURISDICTION, 16.

DEBTOR AND CREDITOR.

1. A creditor at large, or before judgment, is not entitled to the interference of this Court, by *injunction*, to prevent the debtor from disposing of his property in fraud of such creditor. *Wiggins & Boerum v. Armstrong and others*, 144
2. This Court lends its aid to a judgment creditor, by compelling a discovery and account, against a debtor or third person, who has possession of the debtor's property, and placed it beyond the reach of legal process; but the creditor, before he is entitled to such aid, must have sued out execution at law. *Hendricks v. Robinson and others*, 283
3. Conveyances by a debtor of his real estate, declared fraudulent and void against his creditors, under the circumstances. *ib.*
4. Assignments of personal property by a debtor in insolvent circumstances, and who has stopped payment, to secure a particular creditor for existing claims and engagements, as well as for future advances and responsibilities, if made *bona fide*, and where there is no reason to doubt the honesty and fairness of the transaction, will be deemed valid. *ib.*
5. A creditor, to whom his debtor has assigned property, as security for advances and responsibilities, with an agreement that, if the property is not redeemed within a certain time, the assignee may sell it to pay and indemnify himself, may, after the expiration of the time limited, sell the property for his indemnity; and may, with the assent of the debtor, become the purchaser thereof, and of all the equitable or residuary interest of the debtor, at a fair and adequate valuation; and such purchase, if made *bona fide*, and without intent to injure or defraud creditors, will be valid, not only against the debtor, or *cestui que trust*, but against all other persons. *ib.*
6. Where *F.*, a debtor in embarrassed circumstances, made an assignment (absolute on its face) of personal property to *W.*, a creditor, as security for a new loan of money, and for existing claims, and also for his indemnity against existing and future engagements, especially all such as should arise

in the management of the property assigned; and *W.*, for the purposes of the assignment, effected a loan of money from *P.*, on condition of guarantying to him a debt due to him from *F.*, to be paid out of the proceeds of the property so assigned; it was held that *P.*, by lending his money to *W.* on this guaranty, acquired an equitable lien on, and was entitled to be paid his debt out of the proceeds of, the property in the hands of *W.*, in preference to other creditors. *ib.*

7. One creditor may file a bill in behalf of himself and all the other creditors. *ib.*

8. And where one judgment creditor filed a bill for himself alone, it was sustained, it not appearing that there were any other creditors; or if there were, there was reason to believe their judgments had been satisfied; or, if not satisfied, they had not taken any steps at law to enforce payment by execution; and, at any rate, all parties concerned in such judgments were before the Court. *ib.*

9. Though assignments in trust, with a power of revocation, may be good in family settlements, yet a power of revocation reserved by a debtor in an assignment of his property to pay certain creditors, renders the instrument fraudulent and void. *Riggs and others v. Murray and others*, 576

10. In equity, the rule of distribution is equality, and creditors are paid, *pari passu*, in ratable proportions. S. C. 577

11. Where there is no bankrupt law, the principle of which is equality among creditors, an insolvent debtor may prefer one creditor to another; but such preference is to be viewed with jealousy, and should be strictly construed, so as to guard against abuse and fraud. *ib.*

12. The law recognizes no distinction among creditors, or of such debts as are honorary, or privileged to be paid before others. S. C. 578

13. The trustee, under an assignment fraudulent and void, though a creditor, will be ordered to account for all the property received under the assignment, with interest, deducting his commissions and costs; and must come in, *pari passu*, with the other creditors, for his ratable proportion of the debtor's estate. S. C. 582

Vide FRAUDULENT CONVEYANCE. SURETY.

Vide PARTNERSHIP, 1, 2, 3.

DEBTOR (IMPRISONED.)

Vide INSOLVENT, 2.

DECREE.

1. The recitals in a *decree* should not be argumentative, but state merely the conclusions of law and fact. *Dey v. Dunham*, 182

2. Where a deed is set aside as constructively fraudulent, it is usual to direct a release and reconveyance by the party claiming under the deed, with a covenant against his own acts. *ib.*

3. A final decree, regularly obtained and enrolled, cannot be opened or altered, but in a bill of review; and if not enrolled, it can be corrected only on a rehearing, duly applied for according to the rules of the Court. *Bennet v. Winter & Rankins*, 205

4. Instead of enrolments on parchment, as formerly used, the bill, answer, pleadings, and orders, &c. in a cause, are annexed and filed, with a fair engrossed copy of the final decree, in the register's

office, after the expiration of 30 days from the time final decree is pronounced. (Act, 1 N. R. L. 488.) *Wiser v. Blachly and others*, 488

Sale under Decree, *vide* SALE UNDER DECREE.

Vide APPEAL.

DEED.

A recital in a deed, founded in mistake, and untrue in fact, will not be allowed to operate by way of estoppel, to exclude the truth satisfactorily shown to the Court. *Sloughton v. Lynch*, 210

DEFEASANCE.

Vide MORTGAGE, I. 26.

DEVISE.

Vide WILL.

DISCOVERY.

Vide DEBTOR AND CREDITOR, 2.

DIVORCE.

1. Pending proceedings for a divorce, the Court, under the circumstances of the case, ordered that the wife should have the exclusive custody, care, and direction of the children, and that the husband should not be permitted to visit them, except under the direction of one of the masters of the Court. *Codd v. Codd*, 141
2. Where a bill was filed by a wife against her husband, charging him with ill usage, and neglect to pro-

vide for her maintenance, and that he was endeavoring to get possession of a legacy left her by her father, the Court, under the 10th section of the act, sess. 36. c. 102., ordered the legacy to be paid into Court, and the money to be put out at interest by the register in her name, and the interest to be paid to her separate order, from time to time, &c., until the further order of the Court. *Turrell v. Turrell and Jones*, 391

Vide ADULTERY.

DOWER.

1. Where a testator gave to his wife 500 dollars, "to be left in the hands of his executors, to be paid to her for her support, at any time, or at all times, as her need might require;" and also gave her what household goods she needed; and, after bequeathing pecuniary legacies to his grandchildren, directed his farm, &c. to be sold by his executors, who sold it for 6000 dollars; and the wife, after the death of the testator, accepted the legacy, which was paid to her out of the proceeds of the sale of the farm; it was held, that the legacy was not, according to a fair construction of the will, given in lieu, or in bar of dower, but a mere pecuniary bequest; that the acceptance of it by the widow did not affect her right to dower; and that the purchaser of the farm took it subject to the claim of dower. *Adsit v. Adsit*, 44
2. Where a legacy to the wife is not declared, by express terms, to be in lieu of dower, it will not be so intended, unless such intention can be deduced, by clear and manifest implication, from the provisions of the will, so that the claim of dower would be incon-

sistent with the will, or repugnant to the dispositions made by the testator; it must, in fact, if admitted, disturb and defeat the will.
ib.

DRAINING SWAMPS.

Act for, in Orange and Dutchess, *vide* SWAMPS, &c.

DUTCHESS COUNTY.

Vide SWAMPS, &c.

E.

ELECTION.

If residuary legatees might come in and take the land itself, instead of the proceeds, it is too late after a sale by the executors, to make their election. *Osgood and others v. Franklin.* 21

ENROLMENT.

Vide DECREE, 4.

EQUITY OF REDEMPTION.

Vide MORTGAGE, III.

ESTOPPEL.

Vide DEED. EVIDENCE, II. 10.

EVIDENCE

- I. *Written evidence.*
- II. *Parol evidence, to explain, vary, or contradict written instruments.*
- III. *Parol evidence, witnesses, and examination.*

I. *Written evidence.*

1. Where an answer is put in issue, what is confessed and admitted

need not be proved; but where the defendant admits a fact, and insists upon a distinct fact by way of avoidance, he must prove the fact so insisted on in defence.

Hart v. Ten Eyck and others, 62

2. A deed, charged in the bill, and admitted in the answer, may be read at the hearing, without having been made an exhibit before the master. *Dey v. Dunham*, 182
3. Papers or writings, of every description, may be proved at the hearing, and the witnesses may be cross-examined, at the discretion, and under the direction of the Court. *Consequa v. Fanning and others*, 481
4. But no paper can be proved as an exhibit at the hearing, unless satisfactory reasons be shown to the Court why it was not regularly proved, in the usual way, before the examiner. *ib.*
5. A receipt for money subsequently discovered, is not alone sufficient to open a verdict, judgment, award, or decree. *Todd v. Barlow*, 553

Vide DEED. PRACTICE, III. 12.

II. *Parol evidence, to explain, vary, or contradict written instruments.*

6. A resulting trust may be proved by parol. *Botsford v. Burr*, 409
7. Even in opposition to the deed, and the answer of the defendant denying the trust. *Gillespie v. Moon*, 601
8. But if a party, who sets up a resulting trust, has paid no money, he cannot show, by parol proof, that the purchase was for his benefit. *Botsford v. Burr*, 409
9. Parol proof of declarations inconsistent with a deed are inadmissible. *ib.*
10. A party is concluded by his deed from setting up a different consideration, except upon the allega-

- tion of fraud, mistake, or surprise. S. C. 415
11. Parol evidence is admissible to rebut a resulting trust. S. C. 416
 12. A written agreement may be waived by parol. *ib.*
 13. Danger of admitting parol declarations, or conversations of parties, to impair written contracts. *King v. Baldwin & Fowler*, 557
 14. Where a bill is filed to correct an alleged mistake in a contract or agreement, the evidence of the mistake must be clear and certain. *Executors of Getman v. Beardsley*. 274
 15. Equity relieves against a mistake, as well as against fraud, in a deed or contract in writing; and parol evidence is admissible to prove the mistake, though it is denied in the answer; and this, either where the plaintiff seeks relief affirmatively, on the ground of the mistake, or where the defendant sets it up as a defence, or to rebut an equity. *Gillespie and wife v. Moon*, 585
 16. As where a trustee for an infant, in 1799, agreed to sell 200 acres of land, (part of a lot containing 250 acres,) and executed a deed to the purchaser, (a tenant on the lot,) which described the premises by metes and bounds, "containing 200 acres, more or less;" and the bounds included the whole lot, or 250 acres; and the trustee died in 1814, without taking any measures to have the mistake corrected, though she expressed her intention to do so in 1806; and the *cestuy que trust*, immediately after her death, filed a bill for relief against the mistake; the vendee was decreed to reconvey to the plaintiff the 50 acres, without any allowance for valuable improvements made thereon; they being made after he knew of the mistake, and had declared his intention to take advantage of it. *ib.*
 17. The evidence to show a mistake in a written instrument, must be clear and strong, so as to establish the mistake to the entire satisfaction of the Court. *ib.*
 18. There must be the clearest and most satisfactory proof of the mistake, and of the real agreement between the parties, especially when the mistake is denied in the answer. *Lyman v. United Insurance Company*, 630
 19. And it seems, that parol evidence of confessions or declarations of the defendant, as to the mistake, made 13 years before, if uncorroborated by other facts or circumstances, will not be sufficient. *Gillespie and wife v. Moon*, 585
 20. It seems that a party may show a mistake in an agreement, of which he seeks the specific performance. S. C. 598
 21. What lapse of time will preclude a party from coming in, to rectify a mistake. S. C. 602
- III. *Parol evidence, witnesses, and examinations.*
22. A person convicted of perjury, but who is afterwards pardoned by the governor, is, notwithstanding, an incompetent witness. *Holbridge v. Gillespie*, 35
 23. Although one witness against the positive and direct averment of an answer, be not sufficient for a decree, yet, if that witness be corroborated by circumstances, it will be sufficient. *Hart v. Ten Eyck and others*, 92
 24. Where land was held in trust for G. for life, with power to her to dispose of the same among her children, a son of G. was held a competent witness for the plaintiff, in a suit to recover part of the trust estate, sold in violation of the trust. *Murray v. Winter and Finster*, 155

25. A party to a negotiable instrument is, after it has been discharged, a competent witness to show usury in the transaction. *Dunham v. Dey*, 192
26. A witness should go before the examiner, free to answer all interrogatories, and not with a deposition already prepared. *Underhill v. Van Cortlandt and others*, 339
27. Proof taken in a cause must be pertinent to the issue in the cause; *secundum allegata*. *ib*.
28. If a cross bill contains a charge of fraudulent misconduct in arbitrators, but no such allegation is made in the answer to the original bill, though, by a general order of the Court, the depositions taken in the original suit are allowed to be read in the cross suit; yet such parts of these depositions, as relate to the fraudulent misconduct not charged in the original suit in which they were taken, will be suppressed. *ib*.
29. It seems that the testimony of an arbitrator is not to be admitted to impeach his award. S. C. 349
30. Proofs taken in a cross suit will not be allowed to be read on the hearing in the original cause, unless the parties, by themselves, or by their privies, by representation, are the same in both causes. *Perine v. Swaim and others*, 475
31. When exhibits are proved at the hearing, the witnesses may be cross-examined at the hearing. *Consequa v. Fanning and others*, 481
32. A defendant, who appears to have no interest in the cause, but is made a party, *pro forma*, only, may be examined as a witness for his co-defendant, notwithstanding the plaintiff has filed a replication to the answer of such defendant. *Kirk v. Hodgson and others*, 550
33. An executor, against whom a bill has been taken *pro confesso*, in a suit by legatees, is a competent

witness for the other defendants or devisees. *Lupton & Peursall v. Lupton and others*, 614

34. It seems that a guardian, *ad litem*, is a competent witness, he being, at most, liable only for costs, which are not of course, but discretionary, and according to circumstances. *ib*

Taking Testimony and Examination, *vide* PRACTICE, IV. 13, 14, 15.

Publication, *vide* PRACTICE, IV. 21, 22, 23, 24.

EXAMINATION.

Before a master, *vide* PRACTICE, VI. 29.

EXECUTION.

1. Where an execution has been acted upon, by taking the property into possession, or, perhaps, by advertising it for sale, the person who began it must finish it. *Mason and others v. Sudam and others*, 180
2. Before the act, sess. 36. c. 203. s. 50., interest could not be levied on execution on a judgment, nor can it be levied, on a judgment recovered previous to that act. *ib*.
3. The interest of one partner in the partnership property may be taken and sold under an execution at law, in a judgment against such partner for his separate debt; and equity will not stop such execution, or sale, by injunction, until the partnership accounts are taken and liquidated. *Moody v. Payne*, 548

Supersedeas to Execution, vide CERTIORARI.

EXECUTOR AND ADMINISTRATOR.

- I. *Administration and payment of debts and legacies.*
 II. *Actions by and against, and costs in such actions.*

I. *Administration and payment of debts and legacies.*

1. If an administrator omits to file an inventory of the goods of the deceased, pursuant to the statute, it is a strong circumstance in support of the charge of improper conduct. *Hart v. Ten Eyck and others*, 62
2. If an administrator exhibits an untrue account of the personal estate of the deceased to the Court of Probate, by which he fraudulently obtains an order for the sale of the real estate, he must not only account for the personal effects omitted in his statement, but is answerable for the real estate sold, and that according to its value at the time of filing the bill against him. *ib.*
3. If it seems that the public administrator in the city of *New-York*, has no power (under the act relative to persons dying intestate, &c. in *New-York*, sess. 38. c. 157.) to administer on goods which were shipped at a foreign port, and arrived here after the death of the intestate. *Hammond v. M^r Lea and others*, 493
4. At any rate, this Court will not interfere by injunction in such case, but leave the parties to contest their rights at law. *ib.*
5. The real estate is not charged with the payment of legacies, unless the intention of the testator, to that effect, is expressly declared, and clearly to be inferred from the language and dispositions of the will. *Lupton and Pearsall v. Lupton and others*, 614

506

6. The usual clause devising all the rest of his real and personal estate, not before devised, is not sufficient to show an intention to charge the real estate; nor is the mere direction, that all debts and legacies are to be paid. But if the real estate be devised, "after payment of debts and legacies," it is charged with the payment of them *ib.*

7. Though the real estate be charged, yet the personal estate is the proper fund for the payment of debts and legacies, and is to be first applied, before charging the real estate. *ib.*

8. If an executor pays one legatee, and there is afterwards a deficiency of assets to pay the others, the legatee so paid must refund a proportionable part. *ib.*

9. But if the deficiency of assets has been occasioned by the waste of the executor, the legatee who has been paid, may retain the advantage he has gained by his legal diligence, as against his co-legatees, but not against a creditor. *ib.*

10. A legatee may compel an executor to bring into Court, money in his hands, or to give security, where the legacy is payable at a future day. *ib.*

Power to executors to sell, *vide* POWER.II. *Actions by and against, and costs in such actions.*

11. If the probate of a will be taken out before the hearing of a cause, it is sufficient to support the plaintiff's demand; no objection having been made to the want of it, by pleading. *Osgood and others v. Franklin and others*, 1

Costs in actions by executor or administrator, *vide* COSTS, I. 3.

EXHIBIT.

Vide EVIDENCE, I. 2, 3, 4. PRACTICE, III. 12.

F.

FAMILY SETTLEMENT.

Vide DEBTOR AND CREDITOR, 9.

FANATIC.

Vide JURISDICTION, 4. PLEADING, I. 5.

FEIGNED ISSUE.

Vide ADULTERY.

FORECLOSURE.

Of equity of redemption of mortgage,
vide MORTGAGE, III.

Of equity of redemption of pledge, *vide*
PLEDGE.

FORFEITURE OR PENALTY.

Vide JURISDICTION, 16.

FRAUD.

1. Mere *inadequacy of price* is not a sufficient ground for setting aside a sale, unless the inadequacy be so gross and palpable as, of itself, to afford evidence of actual fraud. *Osgood and others v. Franklin and others*, 1
2. But inadequacy of price, though not so gross as to amount to fraud, may be a sufficient ground for refusing to enforce a specific performance of a contract of sale. S. C. 23

3. And there is a further distinction between those cases where the agreement has been consummated by a conveyance, and where not. S. C. 24

4. Where *B.* obtained from *L.* a deed for land, through fraud, in which *H.* was concerned, and *B.* afterwards confessed a judgment to *H.*, who assigned it to *R.*, for a valuable consideration, and without notice of the fraud; it was held, that, the deed to *B.* being null on account of the fraud, the judgment created no valid lien on the land; that *R.* took the assignment at his peril, and subject to all the existing rights of the debtor; and the land was decreed to be re-conveyed, discharged from the judgment, and a perpetual injunction awarded. *Livingston v. Hubbs and others*, 512

Vide FRAUDULENT CONVEYANCE.

FRAUDS. (STATUTE OF.)

Vide FRAUDULENT CONVEYANCE, 6, 7.

FRAUDULENT CONVEYANCE.

1. A deed fraudulent on the part of the grantor, may be set aside, though the grantee is a *bona fide* purchaser, and ignorant of the fraud. *Hildreth v. Sands and others*, 35
Vide *Peck v. Ellis*, 135
2. But the fraud of the grantor must be clearly established by proof: the mere fact, that the grantor has suffered the bill to be taken, as against him, *pro confesso*, is not sufficient. *Hildreth v. Sands and others*, 35
3. Fraud may be inferred from circumstances, such as the smallness of the consideration expressed, compared with the fair price of 507

- the property conveyed; the want of proof of any price having been actually paid; the grantor continuing in possession or exercising acts of ownership; or circumstances attending the delivery and execution of the deed, &c. *Hildreth v. Sands and others*, 35
4. A deed brought forward as founded on a valuable consideration, cannot be set up as a gift or voluntary conveyance, but the party is bound by the consideration alleged. *ib.*
 5. A deed not fraudulent at first, may become so afterwards, by being concealed or not pursued, by which means creditors have been drawn in to lend their money. *ib.*
 6. A purchaser at a sheriff's sale under the judgment of a creditor, is entitled to the benefit of the statute of frauds, equally as the creditor himself. *ib.*
 7. Possession of land, and taking the profits, after an absolute conveyance, is evidence of fraud within the statute of frauds, unless such possession be consistent with the terms and object of the deed, or the character of it be openly and explicitly understood. S. C. 46
 8. Whether a deed, voluntary, or founded only on ties of blood, is void against subsequent creditors, where the party is indebted at the time, and the debt is not secured, or the debtor is unable to pay? *Quere.* S. C. 48
 9. Whether a voluntary settlement is not void against a subsequent creditor, though the party is not indebted at the time of settlement? *Quere.* S. C. 49
 10. Where a debtor conveys all his estate, real and personal, in trust for all his creditors, such trustee is considered as a *bona fide* purchaser. *Dey v. Dunkam*, 182
 11. Though there is a schedule annexed to the assignment in trust, which mentions that the title to the land was in the defendant, (the grantee in the original deed,) and that he held it as collateral security to pay certain notes, this is not a sufficient notice to the trustee. *ib.*
 12. A notice that is to break in on the registry act, must be such as, with the attending circumstances, will affect the subsequent purchaser with fraud. S. C. 190
 13. A notice merely to put the party on inquiry is not sufficient for that purpose. *ib.*
 14. Where a deed is set aside as constructively fraudulent, it is usual to direct a release and re-conveyance by the party claiming under the deed, with a covenant against his own acts. S. C. 194
 15. Conveyances by a debtor of his real estate declared fraudulent and void as against his creditors. *Hendricks v. Robinson and others*, 297
 16. Where, on a sale of real estate, no security, other than the personal responsibility of the purchaser, was taken for the consideration, this was held a circumstance from whence to infer fraud. S. C. 300
 17. Subsequent transactions, as the assignment of debts by the grantor to the grantee to secure money advanced by the latter to the former after the sale, or the sale of personal property to a great amount by the grantor to the grantee, and taking his personal security only, are also circumstances to lead to the conclusion of fraud. S. C. 302
 18. Assignments of personal property by a debtor in insolvent circumstances, and who has stopped payment, to secure a particular creditor for existing claims and engagements, as well as for future advances and responsibilities, if made *bona fide*, and under circumstances which leave no doubt of the honesty and fairness of the

transaction, will be deemed valid.
S. C. 306

19. A creditor, to whom his debtor has assigned property as security for advances and responsibilities, with an agreement that, if the property was not redeemed within a certain time, the assignee might sell to pay and indemnify himself, may, after the expiration of the time limited, sell the property for his indemnity; and may, with the assent of the debtor, become the purchaser thereof, and of all the equitable or residuary interest of the debtor, at a fair and adequate valuation: and such purchase, if made *bona fide*, and without intent to injure or defraud other creditors, will be valid not only against the debtor, or *cestuy que trust*, but against all other persons. S. C. 311

20. An assignment by a debtor of all his property in trust, to pay the trustees, and such other creditors as the debtor, in one year, by deed, might direct and appoint, &c., reserving a power to appoint new trustees, and to revoke, alter, add to, or vary the trusts, at his pleasure, is fraudulent and void. *Riggs and others v. Murray and others*, 565

21. The trustees under such deed were decreed to account for the proceeds of the property received by them, under the assignment, with interest, deducting their commissions and charges; and to be entitled only to come in, *pari passu*, with the other creditors, for their ratable proportion of the debtor's estate. *ib.*

G.

GUARDIAN.

The Court may discharge or change a guardian appointed by a surro-

gate: but it is not done unless on special cause shown. *Ex parte Crumb*, 439

Guardian *ad litem*, *vide* EVIDENCE, III.

34. PRACTICE, I. 5.

H.

HABEAS CORPUS.

1. Under the *habeas corpus* act, the chancellor will not discharge a prisoner who had been committed by a justice of the peace, under the act for apprehending and punishing disorderly persons, the warrant of commitment stating that the prisoner had been duly convicted, &c., and the conviction being, *prima facie*, legal and regular. *People v. Goodhue*, 198
2. *Quare*, whether this Court, independently of the statute, has any common law jurisdiction in such case? *ib.*

HEIR.

Costs in actions by and against, *vide* COSTS, I. 1. 3.

HEMPSTEAD. (TOWN OF.)

1. The undivided lands, plains, marshes and beaches, situate in the town of *Hempstead*, and included in the tract of land granted in 1644, by the *Dutch* governor, *Kieft*, and afterwards, in 1685, by the *English* governor, *Dongan*, belonged to the town, in its collective or corporate capacity, as common property, and not to individuals, or to the heir of the surviving patentee, or those deriving title from the patentees or associates; and those lands remained common undivided prop-

- erty, belonging to the freeholders and inhabitants of *Hempstead*, at the time the town was divided, in 1784, into *North* and *South Hempstead*. *Denton and others v. Jackson and others*, 320
2. Whether the freeholders and inhabitants of *North Hempstead*, in their new corporate capacity, are entitled to any share in those plains, &c. ? *Quære.* *ib.*
 3. Private individuals, freeholders and inhabitants of that town, cannot file a bill in behalf of themselves, and all others who may come in and contribute to the expense of the suit, or in behalf of the town, to try or establish the rights of the town, in regard to its common property. *ib.*
 4. The *Dutch* patent for the town of *Hempstead*, in 1644, conferred a qualified corporate capacity on the inhabitants. S. C. 324
 5. The *English* patent, in 1685, to *Hempstead*, is a confirmation of the former *Dutch* patent, and was intended for the same corporate purposes. S. C. 326
 6. And the freeholders and inhabitants, in their town meetings, acted in their collective capacity, in regard to their common lands, as well as in the choice of town officers, &c. S. C. 327
 7. *John Jackson*, the last surviving patentee named in the *English* patent, could not, by his deed of the 17th of *April*, 1722, enlarge or abridge the rights of the town to its common property under the patent; nor could he limit or designate the associates of the patentees. S. C. 329
 8. The plains, marshes and beaches included within the original patent to the town of *Hempstead*, continue the common property of the town, except such parts of the plains as have been granted by regular town meetings to individuals. S. C. 333
 9. The assessment of 1685, of the sums which the freeholders and inhabitants were respectively to contribute towards the expenses of obtaining the patent from the *English* governor, furnishes no ground for a partition of the common property of the town among individuals, especially after the lapse of more than a century. S. C. 334
 10. The plains, &c. remained common undivided property of the town of *Hempstead*, at the time of its division into two towns in 1784. *ib.*

HUSBAND AND WIFE.

Vide BARON AND FEME.

I.

IDIOT AND LUNATIC.

1. An inquisition of lunacy taken abroad, or in another state, is not sufficient to authorize a sale of the lunatic's estate for his maintenance; but it is sufficient to warrant the issuing of a new commission here, and may, perhaps, be sufficient ground or evidence to warrant an inquisition here, on such new commission. *Matter of Perkins*, 124
2. Where a person, from old age, sickness, or other cause, becomes so weak and incapacitated in mind, as to be unable to manage his affairs, a commission, in nature of a writ *de lunatico inquirendo*, may be awarded. *Matter of Barker*, 232
3. And where the inquisition of such a writ found the party, who was 85 years old, to be "of unsound mind, and mentally incapable of managing his affairs," a commit-

- tee of his estate was appointed.
Matter of Barker, 232
4. A creditor of a lunatic may file a bill for the payment of his debt, against the committee of the lunatic, without making the lunatic himself a party. *Executors of Brasher v. Van Cortlandt*, 242
 - S. P. S. C. 401
 5. Where a creditor wishes to obtain payment of his debt out of a lunatic's estate, and no inventory of the estate has been filed by the committee of the lunatic, according to the statute, the proper course is, to cause the committee, by citation or otherwise, to file the inventory, and to present a petition to the Court stating the amount of the estate, debts, &c. S. C. 242
 6. Where the real estate of a lunatic is ordered to be sold, the sale is to be conducted by the committee, not by the master, but he, or some other person, may be joined with the committee, for that purpose, and to execute the conveyance. *ib.*
 7. The usual course to obtain payment of a debt due from a lunatic, is by petition to this Court. S. C. 245
 8. The real estate of a lunatic may be sold for the payment of his debts, on a bill filed by a creditor for that purpose, without a petition of the committee of the lunatic, under the *Act concerning Idiots and Lunatics*, &c., Sess. 24. c. 30.; but the sale is to be conducted under the directions of the Court, by a master, and the committee of the lunatic; and the terms of sale, &c. must be reported to the Court for its approbation, before any conveyance is executed. S. C. 400
 9. The proper remedy for the creditor of a lunatic is in this Court, which has the sole custody and disposal of his real estate, and not by an action at law. *ib.*
 10. Where it appeared that all the estate of a lunatic had been expended in his necessary maintenance, the Court, on petition of the committee, and report of a master, ordered the lunatic to be delivered over to the overseers of the poor of the town. *Matter of M'Farlan*, 440

IGNORANCE OF LAW.

1. The Court does not relieve parties from their acts and deeds fairly done, on a full knowledge of the facts, though under a mistake of the law. *Lyon & Brockway v. Richmond and others*, 51
2. Every person is charged, at his peril, with a knowledge of the law. *ib.*

INADEQUACY OF PRICE.

Vide AGREEMENT, II. 5. FRAUD, 1, 2, 3.

INFANT.

Where a suit is instituted in behalf of an infant, by a *prochein amy*, the Court, on a suggestion of its being improperly instituted, will refer it to a master to inquire into the circumstances, and report whether the suit is for the benefit of the infant. *Garr and others v. Drake & Garr*, 542

Vide DIVORCE, I.

INFANT TRUSTEE.

Vide TRUST AND TRUSTEE, I. 6.

INJUNCTION.

- I. *Injunction to stay waste or trespass.*
- II. *Injunction to stay proceedings at law.*
- III. *Injunction for other purposes.*
- IV. *Dissolving injunction.*

I. *Injunction to stay waste or trespass.*

1. An injunction to stay waste between tenants in common, lies, in special cases; as to prevent one tenant in common in possession, from cutting down timber growing on the land, and not wanted for the necessary use of the farm. *Hanley v. Clowes*, 122
2. An injunction lies against a mortgagor, in possession of the mortgaged premises, to stay waste. *Brady v. Waldron and Waldron*, 146
3. Where commissioners, appointed under the authority of an act of the legislature, to drain a swamp, exceed their authority, to the injury of the plaintiff, a perpetual injunction will be granted, although there has been no trial at law; the plaintiffs' right to the land being undisputed. *Belknap and others v. Belknap and others*, 463

II. *Injunction to stay proceedings at law.*

4. In injunction causes, where the title at law is admitted, or no discovery is sought for, to aid a defence at law, an injunction will be granted upon terms only, so as to leave the party to proceed to trial and judgment at law. *Ham v. Schuyler and others*, 140
5. Relief will not be granted for the purpose of a new trial at law, where the party lost his oppor-

tunity of defence by his own negligence. *Dodge and others v. Strong*, 228

6. Where a rule for a new trial was granted by the Supreme Court, on conditions which the party failed to perform within the time prescribed by the rule, this Court refused its aid, it not appearing that the failure arose from the act of the opposite party, or from unavoidable necessity. *ib.*
7. A bill of peace, to prevent litigation at law, is allowed only in case the plaintiff has satisfactorily established his right at law, or where the persons who controvert the right are so numerous as to render an issue, under the direction of the Court, necessary to bring in all the parties concerned, and to prevent a multiplicity of suits. *Eldridge v. Hill and Murray*, 281

Vide AGREEMENT, I. 3. ASSIGNMENT, 6. EXECUTION, 3. VENDOR AND PURCHASER, 3, 4, 5.

III. *Injunction for other purposes.*

8. A creditor at large or before judgment, is not entitled to the interference of this Court, by injunction, to prevent the debtor from disposing of his property in fraud of such creditor. *Wiggins and Boerum v. Armstrong and others*, 144
9. This Court has a concurrent jurisdiction with Courts of law, in a case of private nuisance, by diverting or obstructing an ancient water course, and may issue an injunction to prevent the interruption, though the plaintiff has not established his title at law. *Gardner v. Trustees of Newburgh*, 163

10. In what cases an injunction may properly issue. *Attorney-General v. Utica Insurance Company*, 379
11. Carrying on banking operations, contrary to the statute, is not such a mischief, or public nuisance, that this Court would grant an injunction to restrain the party, even if it had jurisdiction over public nuisances, which it seems it has not. *ib.*

Vide EXECUTOR AND ADMINISTRATOR,
I. 4. STATUTE, 2.

IV. Dissolving injunction.

12. If all the defendants are implicated in the same charge, the answer of all will, in general, be required; but if the defendant, on whom the *gravamen* of the charge rests, has fully answered, that may be sufficient. *Depeyster v. Graves and others*, 148
13. But where the answer of all the defendants can and ought to come in, yet if the plaintiff does not take the requisite steps, with all reasonable diligence, to expedite his cause, the injunction may be dissolved. *ib.*
14. As where an injunction had been granted to stay a suit at law, and some of the defendants had answered, but the plaintiff had neglected, for nine months, to take any steps to compel the other defendants to appear and answer, or to have the bill taken, *pro confesso*, against them, the injunction was, on motion, dissolved. *ib.*
15. Affidavits, *ex parte*, are not allowed to be read in support of an answer, on a motion to dissolve an injunction. *Roberts and Boyd v. Anderson*, 202
16. Where the bill on which an injunction was issued, to stay proceedings at law, in an ejectment

suit, charges the deeds, on which the defendant sets up his title at law, to be fraudulent, the injunction will not be dissolved on the coming in of the answer, unless it be full and satisfactory as to the fraud, but will be continued until the hearing. *ib.*

17. Stating that the defendants were not privy to any fraud, and were *bona fide* purchasers; that they believe the title was good, and that they do not know or believe, that the deeds under which they derive their title were fraudulent, is not sufficient. *ib.*
18. The granting and continuing of injunctions rests in the discretion of the Court, to be governed by the nature and circumstances of the case. *ib.*
19. An injunction will, in general, be dissolved when an answer comes in, and denies all the equity of the bill. S. C. 205
20. If the party obtaining an injunction to stay proceedings at law, neglects to deposit 100 dollars at the time, pursuant to the 43d rule of the Court, the irregularity will be cured by his depositing that sum, before a motion is made to dissolve the injunction, but he must pay the costs of the motion. *Skinner v. Dayton and others*, 226
21. So, if he omits to enter the order for the injunction with the register, at the time, a subsequent entry of it, before motion, will cure the neglect, but he will have to pay costs. *ib.*

INQUISITION OF LUNACY.

Vide IDIOT AND LUNATIC, 1, 2, 3.

INSOLVENT.

1. Where a party has been dis-

charged under the insolvent act, and assigned his property pursuant to the act, an application cannot be sustained, in relation to his property, or interest, without making his assignees parties. *Sells v. Administrators of Hubbell*, 394

2. A creditor, who has the body of his debtor in execution, cannot be a petitioning creditor under the insolvent act; nor is he entitled to apply to a judge for an assignment of a debtor's estate, under the 9th section of the act, Sess. 36. c. 98. 1 R. L. 460. 464. *Beatty v. Beatty*, 430

Vide PARTNERSHIP, 2.

INTEREST.

1. The correct and legal mode of computing interest, on an account between debtor and creditor, where partial payments are made, is first to carry the payment to the extinguishment of the interest due, and if such payment exceeds the interest due at the time, then to deduct the surplus only from the principal, and compute interest on the balance to the next payment. *Stoughton v. Lynch*, 209
2. Whether the practice, prevailing among merchants, in settling their accounts, to state an *interest account*, on which interest is charged on each item of principal on the debit side, and credited on each item on the credit side of the account, and a balance of such interest account struck, and added to the balance of principal, is to be adopted in the settlement of accounts between merchant and merchant? *Quære.* *ib.*
- 3 But where a master, under an order of reference to him, in stating an account between the

514

parties who were partners in trade, adopted this mercantile usage, the amount was allowed to stand, there being evidence before the master that, from the books of account, and otherwise, the parties themselves had followed this usage, and the calculation was so made by an eminent merchant, to whom the accounts were referred, with the consent of the parties, who did not question the statement, when it was brought in to the master. *ib.*

Interest on judgment, *vide* EXECUTION, 2.

Interest on legacy, *vide* LEGACY, 4, 5.

Compound interest, *vide* PARTNERSHIP, 4.

J.

JUDGMENT.

Priority and lien of judgments and executions.

1. The mere equitable interest of a debtor in personal property, assigned by him as security, cannot be reached by process at law, or be bound by execution. *Hendricks v. Franklin and others*, 284
2. Suing out execution merely does not create a lien on goods and chattels; but there must be an actual levy of the execution to bar any subsequent *bona fide* sale. *ib.*
3. The property of the debtor in goods and chattels, is not changed until execution is executed. *ib.*
4. A judgment, fraudulently obtained, creates no lien in the hands of a *bona fide* assignee. *Livingston v. Hubbs and others*, 512

Interest on judgment, *vide* EXECUTION, 2.

JURISDICTION.

1. The Court does not relieve parties from their acts and deeds fairly done, on a full knowledge of the facts, though under a mistake of the law. *Lyon & Brockway v. Richmond and others*, 51
2. The Court has jurisdiction to prevent a tenant in common from committing waste. *Hawley v. Clowes*, 122
3. Chancery has concurrent jurisdiction with Courts of law in cases of private nuisance. *Gardner v. Trustees of Newburgh*, 164
- S. P. *Van Bergen v. Van Bergen*, 272
4. Persons incompetent to protect themselves, from old age, weakness of mind, or from some delusion or fanaticism, are entitled to the protection of the Court. *Makin v. Makin and others*, 238
- S. P. *Matter of Barker*, 232
5. Where a bill is filed to correct an alleged mistake in a contract or agreement, the evidence of the mistake must be clear and certain. *Executors of Getman v. Beardsley*, 274
6. The bill being filed solely to correct a mistake in the contract, will not be retained on the ground that there is money due on the contract from the defendant. *ib.*
7. A bill of peace, to prevent litigation at law, is allowed only in case the plaintiff has satisfactorily established his right at law, or where the persons who controvert the right are so numerous as to render an issue, under the direction of the Court, necessary to bring in all the parties concerned, and to prevent a multiplicity of suits. *Elbridge v. Hill and Murray*, 281
8. Where a defendant puts in an answer, instead of demurring to the bill, and the cause comes on to be heard upon the merits, it is too late to object to the jurisdiction of the Court, on the ground that the plaintiff has adequate remedy at law, which he might have pursued. *Underhill v. Van Cortlandt and others*, 339
9. This Court has no jurisdiction over offences against a public statute, or to restrain persons from carrying on the business of banking, in violation of the act passed the 6th of April, 1813, to restrain unincorporated banking associations; and a motion made by the attorney-general, on an information filed by him, *ex officio*, for an injunction for that purpose, was refused. *Attorney-General v. Utica Insurance Company*, 371
10. When a cause depends simply and entirely on the solution of a legal question, the proper forum for the determination of that question is a Court of law. S. C. 376
11. This Court has no jurisdiction of offences against the public, or of criminal matters. S. C. 378
12. Whether this Court has jurisdiction or control over corporations, in respect to breaches of trust, unless in the case of a charitable institution? *Quære*. S. C. 384
13. Whether this Court has a visitatorial power or superintending jurisdiction over corporations, civil, eleemosynary, or charitable? *Quære*. S. C. 386
14. But the persons who exercise the corporate powers may, in their character of trustees, be accountable to this Court for a fraudulent breach of trust. S. C. 389
15. The proper remedy for the creditor of a lunatic is in this Court, which has the sole custody and disposal of his real estate, and not by an action at law. *Executors of Brasher v. Cortlandt*, 400
16. A Court of equity gives relief against a penalty or forfeiture, 515

where the case admits of certain compensation; but not where the sums covenanted to be paid are in the nature of stipulated damages; but it will not interfere unless the party can be clearly and fully indemnified, and placed in the same situation as if nothing had happened. *Skinner v. Day-ton and others*, 526

17. Where a party, on being sued at law, made his defence, which was overruled as insufficient, he cannot, on the same facts merely, obtain relief in equity. *King v. Baldwin and Fowler*, 557

18. Equity relieves against a mistake as well as against fraud, in a deed or contract in writing; and parol evidence is admissible to prove the mistake, though it is denied in the answer; and this whether the plaintiff seeks relief affirmatively, on the ground of the mistake, or where the defendant sets it up as a defence, or to rebut an equity. *Gillespie and wife v. Moon*, 585

Vide AWARD, 1. 3. 7. 13, 14. HABEAS CORPUS. INJUNCTION. NE EXEAT REPUBLICA.

K.

KAIN AND REA, EXECUTORS OF REA.

Act for their relief, *vide* STATUTE, 3, 4, 5.

L.

LACHES AND LENGTH OF TIME.

1. The statute of limitations is a good plea in bar, in this Court, as well as at law; and where, to a suit at 516

law, the defendant had pleaded the statute, and the plaintiff filed a bill of discovery, with a view to enable him to show a promise within six years, it was held that the defendant was not bound to discover any thing that would destroy the effect of his plea at law. *Lansing v. Starr*, 150

2. The limitation of the statute against usury must be pleaded or insisted on in the answer, otherwise the party cannot have the benefit of it at the hearing. *Dey v. Dunkam*, 191

3. A prescription of 20 years will bar a claim to a right of common. *Denton and others v. Jackson and others*, 338

Vide EVIDENCE, II. 21.

LEASE.

A surrender of a lease by the lessee to the lessor, is, it seems, an extinguishment of the growing rent. *Shepard v. Merrill and Tucker*, 280

Vide TRUST AND TRUSTEE, II. 7, 8.

LEGACY.

1. If an executor pays one legatee, and there is, afterwards, a deficiency of assets to pay the others, the legatee so paid must refund a proportionable part. *Lupton and Pearsall v. Lupton and others*, 614

2. But if the deficiency of assets has been occasioned by the waste of the executor, the legatee who is paid may retain the advantage he has gained by his legal diligence, as against his co-legatees, but not against a creditor. *ib.*

3. A legatee may compel an executor to bring into Court money in his

hands, or to give security, where the legacy is payable at a future day. *ib.*

4. A legacy, payable at a future day, does not carry interest until after it is payable, unless it is given to a child, and the parent, by the will, has made no other provision for its maintenance. *ib.*
5. But this exception, it seems, does not extend to grandchildren. *ib.*

Vide ELECTION. DOWER. EXECUTOR AND ADMINISTRATOR, I. 5, 6, 7, 8, 9, 10.

LIEN.

Vide ASSIGNMENT, 2. 6. JUDGMENT.

LIMITATION OF ACTION.

Vide LACHES AND LENGTH OF TIME.

LIS PENDENS.

Vide NOTICE, 1, 2, 3, 4.

LUNATIC.

Vide IDIOT AND LUNATIC.

M.

MAINTENANCE.

When decreed to Wife, *vide* BARON AND FEME, 1, 2, 3, 4, 5.

MISTAKE.

Mistake in an account, *vide* ACCOUNT, 3.

When mistake in written instruments will be corrected, *vide* EVIDENCE, II. 10, 14, 15, 16, 17, 18, 19, 20, 21.

PLEADING, II. 12.

MORTGAGE.

- I. *Of the mortgage generally.*
- II. *Registry of mortgages.*
- III. *Equity of redemption, foreclosure, and sale.*

I. *Of the mortgage generally.*

1. An absolute deed with a defeasance, is a mortgage. *Dey v. Dunham,* 189
2. An injunction lies against a mortgagor in possession, to stay waste. *Brady v. Waldron,* 146

Vide TRUST AND TRUSTEE, II. 7.

II. *Registry of mortgages.*

3. Where a deed, absolute on the face of it, is recorded as a deed, and afterwards the grantee executes a defeasance, which is not registered or recorded, the defeasance, connected with the first deed, is considered as a mortgage, and must be registered as such, to give it priority over a subsequent deed to a bona fide purchaser. *Dey v. Dunham,* 182
4. The record of the absolute deed, as such, is no notice to a subsequent purchaser. *ib.*
5. It must be such a notice as, with attending circumstances, will affect the subsequent purchaser with actual fraud. *ib.*
6. A notice, enough merely to put the party on inquiry, is not sufficient to break in upon the registry act. *ib.*
7. The act concerning mortgages extends to leasehold as well as to freehold estates. *Berry, and another v. Mutual Insurance Company,* 698
8. Priority of registry is of no avail against a previous notice of an unregistered mortgage. *ib.*

9. Where several equitable interests, affecting an estate, are otherwise equal, they will attach according to priority of time. *Berry and another v. Mutual Insurance Company*, 603
 10. A second mortgagee, who neglects to have his mortgage registered, will not be relieved against a prior unregistered mortgage, unless he shows, from non-delivery of possession, or other circumstances, that imposition has been, or might be, practised on him, by or with the concurrence of the first mortgagee, which could not be detected or guarded against, by the exercise of ordinary diligence. *ib.*
 11. The mere circumstance of leaving the title deeds with the mortgagor, is not, of itself, sufficient to postpone the first mortgagee to a second mortgagee who has taken the title deeds without notice of the prior encumbrance. There must be fraud, or gross negligence, equivalent to fraud, on the part of the first mortgagee. *ib.*
 12. A subsequent *bona fide* purchaser is expressly protected by the statute, against prior unregistered encumbrances; but a mortgagee is not a purchaser within the meaning of the statute. *ib.*
 13. He may, however, protect himself by a registry, against a prior unregistered mortgage, without notice. *ib.*
 14. The statute does not make a registry indispensable. The omission to register only exposes the mortgagee to the hazard of losing his lien, in case of a subsequent *bona fide* purchaser, or to the postponement of it to a subsequent mortgage registered. *ib.*
 15. The registry of a mortgage is a substitute for the deposit of the title deeds. S. C. 611
- 518
- III. *Equity of redemption, foreclosure, and sale.*
 16. Where the plaintiff assigned the lease of a farm to secure the payment of a debt due to the defendant; and the parties afterwards entered into an agreement, by which the plaintiff, in consideration of a sum of money expressed, but not in fact paid, agreed to give up to the defendant one half of the farm, and the defendant entered into possession of the premises, and surrendered the lease to the landlord, and took a new lease for an extended term of years; it was held, that the plaintiff was entitled to redeem the whole premises, and on such redemption, to have the entire benefit of the new lease. *Holbridge v. Gillespie*, 30
 17. Contracts made with the mortgagor, to lessen or embarrass the right of redemption, are regarded with jealousy. S. C. 34
 18. A bill may be filed in this Court to redeem personal property pledged for a debt. *Hart v. Ten Eyck and others*, 62
 19. But the creditor holding goods in pledge may sell them without a bill for foreclosure, on giving reasonable notice to the debtor to redeem. *ib.*
 20. *Aliter*, in case of a mortgage of real estate, which can never be sold without a bill for foreclosure, and a decree for a sale. *ib.*
 21. If the mortgagee sells the equity of redemption, by execution at law, to satisfy the mortgage debt, and then proceeds at law against the mortgagor's person or other property, to obtain the residue of the debt, unsatisfied by the sale of the equity of redemption, or if the whole debt is satisfied by such sale, he must assign over to the

- mortgagor the bond and mortgage, to enable him to compel the purchaser of the equity of redemption to refund him the debt out of the land mortgaged. *Tice v. Annin*, 125
22. But if the mortgagee, by assigning the whole debt and mortgage to the purchaser of the equity of redemption, has put it out of his power to assign them to the mortgagor, the debt will be extinguished in the hands of the purchaser. *ib.*
23. The mortgagor, however, will not be entitled to receive the purchase money; for the purchaser will be considered as having bought the land for the price paid, subject to all the residue of the debt secured by the mortgage, beyond what was extinguished by that purchase money. *ib.*
24. This Court will restrain a mortgagee from proceeding at law to sell the equity of redemption, or put him to his election, either to proceed directly on his mortgage, or to seek other property, (where the rights of creditors do not interfere,) or the person of the debtor, for the satisfaction of the debt. *ib.*
25. If a mortgagee, instead of resorting to a bill of foreclosure, seeks to collect his money out of other property of the mortgagor, his proceeding will be stayed, or he will be compelled to assign over the bond and mortgage to the mortgagor. *S. C.* 128
26. All sales of mortgaged premises under a decree of the Court, must be made by a master or under his direction. *Heyer v. Deaves*, 154
27. A sale by a person deputed for that purpose, by a master, in his absence, is irregular, and will be set aside. *ib.*
28. Where there is an order of reference to a master to ascertain the amount due on a mortgage, on the coming in of his report, the cause must be set down for hearing, on the requisite notice. *Dean v. Coddington and others*, 201
29. A decree of sale entered immediately on filing the report, was set aside for irregularity. *ib.*
30. Where the interest on a mortgage is payable annually, and the principal at a future period, on a bill for a foreclosure and sale, for non-payment of interest, the whole, or a part of the premises, will be sold, as the Court may deem just and necessary, on a special report of the master, as to the situation of the premises, and as to the best mode of sale; and an order, from time to time, as the interest or principal becomes due, for a future sale, may be obtained, on the foot of the decree, on obtaining the master's report as to the amount due, &c. *Brinkerhoff v. Thalhimer*, 486
- S. P. *Lyman v. Sale and others*, 487
31. Where, on a sale of mortgaged premises under a decree, the bond is fully paid, the obligor is entitled to have the bond and mortgage delivered up to him and cancelled. *Matter of Coster*, 503
32. The obligee, or purchaser of the mortgaged premises, is not entitled to retain them in his hands for his own convenience, or for greater security of his title under the decree, without the assent of the obligor. *ib.*
33. But a third person, who pays off mortgage debts for his own security, may be substituted in the place of the mortgagor or obligor, and retain the bond and mortgage. *ib.*

N.

NE EXEAT. REPUBLICA.

In a matter of account of which this Court has jurisdiction, a writ of *ne exeat republica* may issue,

though the plaintiff has sued the defendant at law, and held him to bail; and where a defendant who had been sued at law, and held to bail, in a case not of equity jurisdiction, was about to depart from the state *with his bail*, who had sold his property, the Court, from the necessity of the case, and to prevent a failure of justice, granted the writ. *Porter v. Spencer*, 169

NEW TRIAL.

Vide INJUNCTION, II. 5, 6.

NON COMPOS MENTIS.

Vide IDIOT AND LUNATIC. JURISDICTION, 4.

NOTICE.

1. Where the defendant purchased part of a trust estate, with notice of the pendency of a suit against the trustee for a breach of trust, and of an injunction, he was decreed to pay the consideration money with interest to the plaintiff, for the use of the *cestuy que trusts*, or to convey in fee the land purchased to and for the same trusts. *Murray & Winter v. Finster*, 155
2. The defendant must deny all notice, even though it is not charged, otherwise he will not be deemed a *bona fide* purchaser. *ib.*
3. A purchaser is chargeable with notice of a suit pending in this Court; and after such notice, all further proceedings towards completing the purchase, or paying the money, are fraudulent and void. *Healy and others v. Finster & Muller*, 158
4. A denial of notice of the pendency of the suit is not sufficient, if the

defendant, at the time, knew the character of the person of whom he purchased, that he was a trustee, and had no power to sell. *ib.*

5. Where the executors of a deceased sheriff were authorized, by an act of the legislature, to sell property under execution, the execution of which had been commenced by the testator, and the master sold land under a decree of foreclosure in favor of a subsequent mortgagee, with the assent of the agent of the executors, and a mutual understanding that the sale should be valid, and the execution be satisfied by the master out of the proceeds of such sale, and that was made known to the purchasers at the time, and the agent of the executors, afterwards, sold the land to persons who knew all the circumstances, such subsequent sale was held to be fraudulent and void. *Mason and others v. Sudam and others*, 172
6. Where a deed, absolute on the face of it, is recorded as a deed, and, afterwards, the grantee executes a defeasance, which is not registered or recorded, the defeasance connected with the first deed is considered as a mortgage, and must be registered as such, to give it priority over a subsequent deed to a *bona fide* purchaser. *Dey v. Dunham*, 182
7. The record of the absolute deed as such is no notice to a subsequent purchaser. *ib.*

Vide ASSIGNMENT, 5. COSTS, I. 6. FRAUDULENT CONVEYANCE, II. MORTGAGE, II.

NUISANCE.

1. This Court has jurisdiction in the case of a private nuisance. *Van Bergen v. Van Bergen*, 272

S. P. *Gardner v. Trustees of Newburgh*, 164

2. But it will not give an order to abate the nuisance, until the opposite party has been heard. *Van Bergen v. Van Bergen*, 272

O.

OLD AGE.

Vide JURISDICTION, 4. PRACTICE, I. 5.

ORANGE COUNTY.

Vide SWAMPS, &c. 1, 2.

P.

PARDON.

Vide EVIDENCE, III. 22.

PARTNERSHIP.

1. This Court gives relief against the representatives of a deceased partner who has left assets, if the survivor be insolvent; and the defendants cannot object a want of due diligence in the creditor, in not prosecuting the surviving partner, before insolvency. *Hamersley v. Lambert and others*, 508
2. No delay, in this respect, nor lapse of time, nor dealing with the surviving partner, or receiving from him a part of the debt, will amount to a waiver or bar of the claim on the assets of the deceased partner; for it is a joint and several debt, and the assets of the deceased partner remain liable until the debt is paid; besides, the discharge of the surviving partner under the insolvent act, is a good

plea in bar to a suit against him. *Hamersley v. Lambert and others*, 508

3. The interest of one partner in the partnership property, may be taken and sold under an execution at law, on a judgment against such partner, for his separate debt; and equity will not stop such execution or sale, by injunction, until the partnership accounts are taken and liquidated. *Moody v. Payne*, 548
4. A partner who draws out money from the copartnership funds is not chargeable with compound interest, but with simple interest only on the sums drawn out; unless it appears that he has traded or speculated with the money, and made a profit on it, and refused, on being called on for the purpose, to disclose the profits. *Stoughton v. Lynch*, 209
5. Whether the practice prevailing among merchants in settling their accounts, to state an *interest account*, in which interest is charged on each item of principal on the debit side, and credited on each item on the credit side of the account, and a balance of such interest account struck, and added to the balance of principal, is to be adopted in the settlement of accounts between merchant and merchant? *Quare. ib.*
6. But where a master, under an order of reference to him, in stating an account between the parties, who were partners in trade, adopted this mercantile usage, the account was allowed to stand, there being evidence before the master, that, from the books of account and otherwise, the parties themselves had followed this usage; and the calculation was so made by an eminent merchant to whom the accounts were referred, with the consent of the parties, who did not question the statement

when it was brought in to the master. *Stoughton v. Lynch*, 209

7. In stating an account between partners, the true dates, as furnished by the books of account themselves, ought to be assumed. *ib.*
8. The period of the dissolution of partnership is the proper time to make a rest, and adjust the balance of the partnership account; and the partner against whom the balance is found, is chargeable with interest thereon. *ib.*

Contribution between partners, *vide*
CONTRIBUTION, 5, 6.

PEACE, (BILL OF.)

Vide INJUNCTION, II. 7.

PLEADING.

- I. *Parties.*
- II. *Bill.*
- III. *Answer.*
- IV. *Plea.*
- V. *Demurrer.*

I. *Parties.*

1. Where some of the plaintiffs became insolvent, and on a bill of revivor, their assignees were made defendants, and it was objected at the hearing, that they ought to have been made plaintiffs, it was held that they could not be made plaintiffs against their consent; and having answered as defendants, the Court might infer their refusal to be plaintiffs, and, being before the Court as parties, it was sufficient. *Osgood and others v. Franklin and others*, 1
2. Where real estate had been purchased by a joint fund, raised by subscription of above 250 shares,

or subscribers, and the property was conveyed to A., B. and C., as trustees; on a bill for the sale of the premises, under a mortgage, made to the plaintiffs by the trustees, it is not necessary that the subscribers or stockholders should be made parties; the trustees sufficiently representing all the interests concerned, for that purpose. *Van Vechten & Sebring v. Terry and others*, 197

3. A mere nominal trustee cannot bring a suit in his own name, but the *cestuy que trust* must be joined. *Malin v. Malin and others*, 238
4. The objection may be taken at the hearing. *ib.*
5. If a person has religious scruples against being a party in a suit, he may, it seems, sue by his *prochein amy*. *ib.*
6. A person, against whom process is not prayed, is not a party to the bill. *Executors of Brasher v. Van Cortlandt*, 245
7. A lunatic himself need not be made a party to a suit, by a creditor, against his committee, to obtain payment of a debt out of his estate. *ib.*
- S. P. S. C. 401
8. The question of necessary parties is a matter of discretion, depending on convenience. S. C. 247
9. One creditor may file a bill in behalf of himself and all the other creditors. *Hendricks v. Franklin and others*, 283
10. And where one judgment creditor filed a bill for himself alone, it was sustained, it not appearing that there were any other creditors; or if there were, there was reason to believe their judgments had been satisfied; or if not satisfied, they had not taken any steps at law to enforce payment by execution; and, at any rate, all parties concerned in such judgments were before the Court. *ib.*
11. Where a party has been dis-

charged under the insolvent act, and assigned his property pursuant to the act, an application cannot be sustained, in relation to his property or interest, without making his assignees parties. *Sells v. Administrators of Hubbell*, 394

Vide HEMPSTEAD, (TOWN OF), 3.

II. Bill.

12. A bill filed solely to correct a mistake in a contract will not be retained on the ground that there is money due on the contract from the defendant. *Executors of Getman v. Beardsley*, 274
13. It seems that a cross bill may set up additional facts not alleged in the answer in the original suit, where they constitute part of the same defence, relative to the same subject matter. *Underhill v. Van Cortlandt and others*, 355
14. A bill of review is proper after a decree is enrolled, and a supplemental bill, in nature of a bill of review, before the enrolment of the decree. *Wiser v. Blackly and others*, 448
15. The party who asks for a bill of review must show that he has performed the decree, especially as regards the payment of money, and that he has paid the costs. *ib.*
16. A bill of review must be either for error in point of law, apparent on the face of the decree, or for some new matter of fact, relevant to the case, discovered since publication passed, and which could not, with reasonable diligence, have been discovered before. *ib.*

Bill for an account, *vide ACCOUNT, 1.*

— for a divorce, *vide ADULTERY.*

Bill of discovery, *vide DEBTOR AND CREDITOR, 2*

— of review, *vide DECREE, 3.*

— of peace, *vide INJUNCTION, II. 7.*

— of revivor, *vide PARTIES, I.*

Dismissing bill, *vide COSTS, I. 9.*

Taking bill *pro confesso*, *vide PRACTICE, II.*

Amending bill, *vide PRACTICE, IV. 20.*

III. Answer.

17. Where an answer is put in issue, what is confessed and admitted need not be proved; but where the defendant admits a fact, and insists upon a distinct fact, by way of avoidance, he must prove the fact so insisted on in defence. *Hart v. Ten Eyck and others*, 62
18. A wife may put in a separate answer, where the plaintiff seeks relief out of her separate estate. *Ferguson v. Smith and others*, 139
19. A defendant, claiming as a *bona fide* purchaser, must deny all notice, even though it be not charged. *Murray and Winter v. Finster*, 155
20. And if there was a suit pending in relation to the subject of the purchase, a denial of notice of the pendency of the suit, is not sufficient, if the defendant, at the time, knew the character of the person of whom he purchased, that he was a trustee, and had no power to sell. *Heatley and others v. Finster and Muller*, 158
21. Where a bill was filed by an administrator, for a decree for the distribution of the intestate's estate, the answer of a person entitled, as next of kin, to a distributive share, signed by her at

torney in fact, and not sworn to, or subscribed by the party herself, was received, as the party resided in *Ohio*, and the object of the suit was merely for the security of the administrator.

- *Dumond v. Magee and others*, 240

Answer in injunction causes, *vide* INJUNCTION, IV. 12, 13, 14, 15, 16, 17. 19.

Exceptions to answer, *vide* PRACTICE, IV. 17, 18.

Vide EVIDENCE, III. 23.

IV. Plea.

Plea of the statute of limitations, *vide* LACHES AND LENGTH OF TIME, 1.

V. Demurrer.

- 22. The defendant must take advantage of the objection that the plaintiff has adequate remedy at law, by demurring; after answer, he cannot avail himself of it at the hearing. *Underhill v. Van Cortlandt and others*, 369

PLEDGE.

- 1. A bill may be filed in this Court, to redeem personal property pledged for a debt. *Hart v. Ten Eyck and others*, 62
- 2. But the creditor, holding goods in pledge, may sell them without a bill for foreclosure, on giving reasonable notice to the debtor to redeem. *ib.*

POOR.

Vide IDIOT AND LUNATIC, 10. .
524

POWER.

- 1. A naked power to executors, to sell, does not, at common law, survive. *Osgood and others v. Franklin and others*, 19
- 2. But if executors, having power to sell the real estate, are vested with any interest, legal or equitable, in the estate, the power survives. S. C. 1
- 3. So, if the executors are charged with a trust, relative to the estate, and depending on the power to sell, the power survives. *ib.*
- 4. In the construction of powers of sale, the intention of the testator is much regarded. S. C. 22
- 5. A power to executors, *and to the major part of them, their heirs or executors*, vests, it seems, solely in the last survivor, and his representatives. *ib.*
- 6. Power of the sole acting executor to sell the real estate under the will. *Davoue v. Fanning and others*, 254

POWER OF REVOCATION..

Vide ASSIGNMENT, 7, 8, 9.

PRACTICE.

- I. *Process and appearance.*
- II. *Bill taken pro confesso.*
- III. *Motions and orders.*
- IV. *Taking testimony, feigned issue, and other intermediate proceedings.*
- V. *Hearing and rehearing.*
- VI. *Reference to a master, report, exceptions.*
- VII. *Waiver of irregularity.*

I. Process and appearance.

- 1. The service of *subpoena*, on the husband alone, is good against

both husband and wife, and he must answer for both. *Ferguson v. Smith and others*, 139

2. But if the plaintiff seeks relief out of the separate estate of the wife, the service must also be on her; and she may put in her separate answer. *ib.*

3. Orders for injunctions, and other process, must be entered with the register, or assistant register, before the process issues. *Skinner v. Dayton and others*, 226

4. If the entry cannot be made before issuing the process, without injurious delay, the party, or the clerk for him, ought to cause the rule to be entered, with all reasonable speed, as of the day of the allowance. *ib.*

5. Superannuated persons, on proof of their imbecility, are admitted to appear and answer by guardian. *Matter of Barker*, 235

6. If a person has religious scruples against being a party in a suit, he may, it seems, sue by his *prochein amy*. *Malin v. Malin and others*, 238

7. A party, who takes a copy of a bill, filed against him as committee of a lunatic, and enters his appearance without his addition of committee, &c., cannot afterwards, after suffering the plaintiff to go to a final decree, object that the *subpœna* was against him individually, and not as committee, &c. *Executors of Brasher v. Van Cortlandt*, 247

Vide INJUNCTION, IV. 21.

II, *Bill taken pro confesso*.

8. Whenever a defendant shall cause his appearance to be entered, but shall not cause his answer to be filed in due time, an application may thereupon be made to the chancellor, (without previous no-

tice,) by petition, stating the circumstances, for an order that the defendant answer the plaintiff's bill, in such time, after service of a copy of the order for that purpose, as the chancellor shall direct, or, in default thereof, that the bill be taken *pro confesso*. *Reg. Gen. July 20th, 1816*. 152

9. If the defendant shall not answer, within the time limited by such order, a rule for taking the bill *pro confesso* may be entered, as of course, on filing an affidavit of the service of a copy of the said rule. *ib.*

Vide *Executors of Brasher v. Van Cortlandt* 248

Vide post, VII. 32.

III. *Motions and orders.*

10. Orders for injunctions, as well as other special orders, must be entered with the register or assistant register, not with the clerk, before the process issues. *Skinner v. Dayton and others*, 226

11. Copies of affidavits to support a special motion or petition, must be served on the solicitor of the opposite party, with notice of the motion. *Brown v. Rickets and others*, 425

12. Notice of a motion to prove exhibits at the hearing, must be served four days before the hearing. *Consequa v. Fanning and others*, 461

Motion to dissolve injunction, *vide* INJUNCTION, IV.

Order of reference, *post*, VI. 30, 31.

IV. *Taking testimony, feigned issue, and other intermediate proceedings.*

13. This Court will order a witness to be examined *de bene esse*, though
525

- no answer has been put in, if the necessity for taking his deposition is satisfactorily shown by affidavit. *Fort v. Ragusin and Barker*, 146
14. The deposition of a witness whose examination was not closed until after publication had passed, was allowed to be read, he having been cross-examined by the opposite party, and no actual abuse appearing; but such practice is irregular. *Underhill v. Van Cortlandt and others*, 339
 15. A witness should go before the examiner, free to answer all interrogatories, and not with a deposition already prepared. *ib.*
 16. If a cross bill contains a charge of fraudulent misconduct in arbitrators, but no such allegation is made in the answer to the original bill, though, by a general order of the Court, the depositions taken in the original suit are allowed to be read in the cross suit, yet such parts of these depositions as relate to the fraudulent misconduct not charged in the original suit in which they were taken, will be suppressed. *ib.*
 17. Leave to withdraw the replication, for the purpose of excepting to the answer, is not allowed, unless for special cause, clearly shown, and satisfactorily accounting for the neglect of the plaintiff. *Brown v. Rickets and others*, 425
 18. Where three months had elapsed from the time of filing the answer, and no good cause shown for the delay, the application was refused. *ib.*
 19. But if the plaintiff wishes to withdraw the replication, merely for the purpose of setting the cause down for a hearing on the bill and answer, it seems the motion will be granted. *ib.*
 20. A replication cannot be withdrawn for the purpose of amend- 526
 - ing the bill, unless the plaintiff shows the materiality of the amendments, and why the matter proposed to be introduced as an amendment was not before stated in the bill. *ib.*
 21. After publication has passed, but the deposition taken not read, a motion to enlarge the time of publication will not be granted, but on special cause shown, and due notice to the opposite party of the motion. *Hamersley v. Brown*, 428
 22. A rule to produce certain bonds before the examiner; for the inspection of the opposite party, will not be granted, where the existence of one of the bonds is denied, and the other is denied to have been received by the plaintiff, for the purpose alleged by the defendant; but a cross bill or bill of discovery is the proper remedy. *Lupton & Pearsall v. Johnson and others*, 429
 23. After publication has once passed, witnesses cannot be examined, unless under very special circumstances. *Hamersley v. Lambert and others*, 432
 24. To enlarge publication, is to stay or postpone the rule for passing publication; and a motion for that purpose may be granted, on reasonable cause shown; but this is very different from a motion to examine witnesses, after publication has actually passed. *ib.*
 25. A plaintiff will not be allowed to dismiss his bill without costs, unless it appears that he had reasonable grounds for filing it. *Perine v. Swain and others*, 475
- Vide* ADULTERY. Costs, II. EVIDENCE, III. 26.
- V. *Hearing and rehearing.*
26. A rehearing is not granted for

- costs only, except in special cases. *Eastburn & Downes v. Kirk*, 317
27. A petition for a rehearing ought to state the grounds on which the rehearing is asked, to enable the Court to exercise its judgment as to the propriety of granting the motion. *Wiser v. Blackly and others*, 488
- Vide DECREE, 3. EVIDENCE, I. 2, 3, 4. EXECUTOR AND ADMINISTRATOR, II. 11. Ante, IV. 20. Post, VI. 28.*
- VI. *Reference to a master, report; exceptions.*
28. After a final decree, an order for the defendant to account before the master, so as to vary the relief sought by the bill, will not be granted on motion; but the reference must be granted, if at all, after a rehearing in the cause. *Hendricks v. Robinson and others*, 485
29. General principles on which examinations before a master are to be conducted, regulating and settling the practice, as to the mode of taking testimony, on an order of reference to a master. *Rensen and others v. Rensen and others*, 495
30. In an order of reference to a master, the defendant may be directed to produce before the master, on oath, all books, papers, &c. in his custody or power, and may be examined, on oath, on such interrogatories as the master may direct, relative to the transactions set forth in the pleadings. *Hart v. Ten Eyck and others*, 513
31. Where numerous exceptions were taken to a master's report, and the facts were multiplied, and the defendant applied for an order on the master to furnish *certified copies of the minutes and testimony* taken in the case before a former master, since deceased, and before himself, as the same were in his possession, and of all notes and memorandums made upon the testimony by the masters, and all the *vouchers* produced in evidence before them, relative to the matters of charge and discharge, in taking the account; the Court, on account of the difficulty of specifying the particular parts of the testimony wanted, granted the motion; with the condition that the expense of returning such parts of the testimony as should not be found necessary to support the exceptions, should, in any event, be paid by the defendant. *Jaques and others v. Methodist Episcopal Church and others*, 543
- Calculation of Interest, *vide* INTEREST, 3.
- Vide* INFANT.
- VII. *Waiver of irregularity.*
32. Where a lunatic was named as a party in the bill, with his committee, and the *subpoena* issued in a cause entitled against the committee alone, without naming them as committee; and they entered their appearance in the cause as so entitled, while the plaintiff proceeded in the cause as entitled in the bill, and took the bill *pro confesso*, for want of an answer, and went on to a final decree, it was held that the committee were too late to object to the irregularity, after taking a copy of the bill, and tacitly suffering the plaintiffs to go on to a decree. *Executors of Brasher v. Van Cortlandt*, 242
33. The party who wishes to avail himself of an irregularity in the proceedings of his adversary, must make the objection the first op-

portunity after he has knowledge of it, or has sufficient information to put him on inquiry as to the fact. *Executors of Brasher v. Van Cortlandt*, 242

34. This Court looks to substance, and not form. S. C. 248

Decree, *vide* DECREE.

PREScription.

The owner of land is entitled to the use of a stream of water that has run through it from time immemorial. *Gardner v. Trustees of Newburgh*, 164

When a bar, *vide* LACHES AND LENGTH OF TIME, 3.

PRIORITY OF LIEN.

Vide MORTGAGE, II.

PRISONER.

Vide INSOLVENT, 2.

PROBATE.

Vide EXECUTOR AND ADMINISTRATOR, II. 11.

PROCESS.

Vide PRACTICE, I.

PROCHEIN AMY.

Vide INFANT. PLEADING, I. 5.

PRO CONFESSO.

Vide PRACTICE, II.
528

PROMISSORY NOTE.

1. A holder of a note is entitled to the benefit of a collateral security, given by the maker to the endorser, for his indemnity. *Philips v. Thompson*, 418
2. *R.*, a maker of a promissory note, gave a judgment bond to the endorser, to indemnify him against his endorsement. The note was protested for non-payment, but due notice was not given to the endorser. He, however, afterwards assigned the judgment to the holder of the note, in consideration of being released from all responsibility on his endorsement. This assignment was held to be a waiver of want of due notice, and tantamount to a promise to pay. *ib.*
3. A subsequent mortgage or judgment creditor has no equity to allege against such a waiver of want of notice, in order to avoid the judgment so given, for the indemnity of the endorser. *ib.*
4. The endorser is entitled to due notice from the holder of a note, although he may have other knowledge of its non-payment. S. C. 421

PUBLIC ADMINISTRATOR.

Vide EXECUTOR AND ADMINISTRATOR, I. 3, 4.

PUBLICATION.

Vide PRACTICE, IV. 21, 22, 23, 24.

Q.

QUO WARRANTO.

1. A *quo warranto*, at common law, was a criminal proceeding. *At-*

torney-General v. Utica Insurance Company, 377

2. So, also; is an information in the nature of a *quo warranto*, under the statute. *ib.*

R.

REA'S EXECUTORS.

Act for their relief, *vide* STATUTE, 3, 4, 5.

RECEIPT.

Vide EVIDENCE, I. 5.

REGISTRY.

Vide MORTGAGE, II.

REHEARING.

Vide COSTS, I. 6. DECREE, 3. PRACTICE, V.

RENT.

Extinguishment of, *vide* LEASE.

REVIEW.

Vide DECREE, 3. PLEADING, II. 14, 15, 16.

REPLICATION.

Vide PRACTICE, IV. 17, 18, 19.

S.

SALE UNDER A DECREE.

1. A purchaser, under a decree of the Court, at a master's sale, may be compelled to complete the purchase. *ib.*
- VOL. II. 67

chase; and the Court, where the conditions of the sale give no alternative to the purchaser, will exercise its discretion, under the circumstances of the case, in coercing the purchaser by an attachment. *Executors of Brasher v. Cortlandt,* 505

2. An appeal, interposed after a decree for a sale is essentially executed, does not supersede the completion of the purchase. *ib.*

SALE OF LAND.

Vide VENDOR AND PURCHASER.

SECURITY.

1. A holder of a note is entitled to the benefit of a collateral security, given by the maker to the endorser for his indemnity. *Phillips v. Thompson,* 418
2. A security taken for a specific purpose, can be applied by the holder to that precise object only, and no other. *ib.*

SPECIFIC PERFORMANCE.

Vide AGREEMENT, II. 5.

STATUTE.

1. Though the legislature has power to take private property for useful and necessary public purposes, it is bound to provide a fair compensation to the individual whose property is taken; and until a just indemnity is afforded to the party, the power cannot be legally exercised. *Gardner v. Trustees of Newburgh,* 160
2. Where an act of the legislature authorized the trustees of a village to supply it with water, by means

- of conduits, and, for that purpose, to enter on the lands of other persons, to make reservoirs, and lay conduits, &c., and provided compensation for the owners of such land, and also for the owner of the land on which the spring or source, from which the water was to be conducted, was situated, but made no provision for indemnifying the owners of lands through which the stream flowed, and, from such spring, had run, from time immemorial, for the injury they must suffer by diverting the course of the spring from their farms; the Court granted an injunction to prevent any proceeding to divert the stream, until provision was made for a just compensation to the persons who might be injured by diverting the water. *Gardner v. Trustees of Newburgh*, 162
3. The act of the legislature, passed the 11th of April, 1808, for the relief of *James Kain* and *Stephen Rea*, executors of *David Rea*, deceased, late sheriff of *Ulster*, did not authorize them to sell property under an execution, the execution of which had not been commenced by the deceased sheriff. *Mason and others v. Sudam and others*, 172
4. And the amount of a judgment and execution, with the sheriff's fees, being tendered by a master in chancery, on a sale of land, under a decree in favor of a subsequent mortgagee, and refused, a sale afterwards, under the judgment and execution, by the agent of the executors of *R.*, is wrongful and void. *ib.*
5. Where the master sold a parcel of the land, under a decree, with the assent of the agent of the executors of *Rea*, and a mutual understanding that the sale should be valid, and the execution be satisfied by the master, out of the proceeds of such sale, and that was made known to the purchasers at the time; and the agent of the executors of *R.* afterwards sold the land, under the execution, to persons who knew all the circumstances, such subsequent sale was held to be fraudulent and void. *ib.*
- Vide SWAMPS, &c. TOWN.
- STATUTES CONSTRUED, EXPLAINED, OR CITED.
- 1787, Jan. 26. Sess. 10. c. 1. (Bill of rights,) 166
 —, Jan. 30. Sess. 10. c. 6. (Waste,) 123
 —, Feb. 8. Sess. 10. c. 13. (Usury,) 182
 —, Feb. 26. Sess. 10. c. 44. (Frauds,) 36. 46. 49. 50. 300. 408. 579
 —, March 12. Sess. 10. c. 50. (Estrepeement,) 123
 1788, Feb. 6. Sess. 11. c. 11. (Quo Warranto,) 376
 —, Feb. 9. Sess. 11. c. 31. (Disorderly Persons. Lunatics,) 198. 440
 1801, March 20. Sess. 24. c. 30. (Idiots, Lunatics. Infant Trustees,) 124. 242. 246. 537
 1804, April 9. Sess. 27. c. 91. (Swamps and bogs in Orange and Dutchess,) 463
 1809, March 27. Sess. 32. c. 119. (Newburg,) 163
 1813, March 5. Sess. 36. c. 23. (Wills,) 254
 —, March 19. Sess. 36. c. 32. (Mortgages,) 603
 —, April 5. Sess. 36. 57. (Habeas Corpus,) 198
 —, April 6. Sess. 36. c. 71. (Banks,) 371. 377
 —, April 8. Sess. 36. c. 78. (Poor,) 440
 —, —. Sess. 36. c. 79. (Administration,) 112
- 530

1813, April 10.	Sess. 36.	c. 95.	
(Chancery,)			488
—, April 12.	Sess. 36. c. 98.	(In-	
solvent,)			430
—, April 13.	Sess. 36.	c. 102.	
(Divorce. Adultery,)			225. 391
—, —, —, Sess. 36. c. 203.	(Exe-		
cutions,)			180
1814, April 9.	Sess. 37. c. 108.	(In-	
fants,)			540
1815, April 11.	Sess. 38.	c. 157.	
(Public Administrator,)			493
—, April 17.	Sess. 38.	c. 221.	
(Custody of Children,)			143

STREAM OF WATER.

1. The owner of land through which a stream of water runs, has a legal right to the use of the water, of which he cannot be deprived without his consent, of a just compensation. *Gardner v. Trustees of Newburgh*, 162
2. This Court has a concurrent jurisdiction with Courts of law in a case of private nuisance, by diverting or obstructing an ancient water-course, and may issue an injunction to prevent the interruption, though the plaintiff has not established his title at law *ib.*

SUBPCENA.

Vide PRACTICE, I. 1. 7.

SUBSTITUTION.

Vide CONTRIBUTION, 5, 6. SURETY, 4.

SUPPLEMENTAL BILL.

Vide PLEADING, II. 14.

SUPPLICAVIT.

1. Whether this Court will grant a writ of *supplicavit*, to protect a

married woman from violence threatened to her by her husband, by compelling him to give sureties to keep the peace? *Quare. Codd v. Codd*, 141

2. Such a writ will not be granted where the *menaces*, &c. sworn to, were eight years before the application for the writ, during which interval the husband was absent from the state, and had lately returned; but the Court, under the circumstances of the case, ordered, that the wife should have the exclusive custody, care, and direction of the children, and that the husband should not be permitted to visit them, except under the direction of one of the masters of the Court. *ib.*

SURETY.

1. Mere delay of the creditor to call on the principal debtor for payment, will not discharge the surety. *King v. Baldwin and Fowler*, 554
2. But if the creditor, by express agreement with the principal, varies the terms of the contract, by enlarging the time of performance, without the assent of the surety, the latter is discharged. *ib.*
3. A surety, on paying the debt, is entitled to stand in the place of the creditor, and to be subrogated to all his rights against the principal. *ib.*
4. The rules for the relief of a surety, are the same at law as in equity, when the facts are the same in both Courts. *ib.*
5. And where a surety, who has been sued at law, makes his defence, which is overruled as insufficient, he cannot afterwards, on the same facts only, obtain relief in equity. *ib.*
6. A surety, when the debt becomes

due, may come into equity to compel the creditor to sue for and collect his debt of the principal.
S. C. 561

SWAMPS AND BOG MEADOWS IN ORANGE AND DUTCH- ESS COUNTIES.

1. Under the act for draining swamps and bog meadows in the counties of Orange and Dutchess, passed the 9th of April, 1804, (sess. 27. c. 91.) the inspectors appointed by the Court of Common Pleas, for draining the great swamp or bog meadow near Newburgh, must strictly observe the precise limits prescribed by the act; and can only continue the main ditch dug for that purpose, at the north end of the Great Pond, through lands adjoining the swamp; they have no authority to dig down the outlet at the south-east end of the pond, and thereby injure or destroy valuable mills, &c. erected on the outlet, and on land not adjoining the great swamp, or to break up ancient and useful streams of water, by draining the natural reservoirs which feed them. *Belknap and others v. Belknap and others*, 463
2. And if they exceed their power, in this respect, this Court will grant a perpetual injunction to restrain all proceedings touching the outlet of the pond, and for quieting the plaintiffs in the enjoyment of the water for their mills, &c. *ib.*

T.

TENANTS IN COMMON.

Vide INJUNCTION, I. 1.
532

TITLE DEEDS.

Vide MORTGAGE, II. 11. 15.

TOWNS.

1. The several towns in this state are legal communities, or bodies politic for certain purposes. *Denton and others v. Jackson and others*, 325
2. Votes of town meetings relative to the common property of the town, unless carried into execution, may be altered or rescinded by subsequent town meetings. S. C. 331
3. The erecting of a new town does not take away or impair the rights of the old town, in regard to its common property, unless there be some special provision in the act erecting the new town, for that purpose. S. C. 336
4. So, when a new town, or a new county, is erected out of an old one, it loses its right to the use of the town property, which remains in the old town, though acquired at the common expense of all the inhabitants before the division, unless there is some express provision to the contrary. *ib.*
5. Each town takes to itself, unless otherwise expressly provided, the common lands that fall within its bounds. *ib.*
6. The general revised act of 1778, relative to towns, makes no change in the law, in this respect. S. C. 337

TRESPASS.

No contribution between joint trespassers; *vide* CONTRIBUTION, 1. 3, 4.

TRUST AND TRUSTEE.

- I. *How trusts are created, and their incidents. Cestui que trust and trust estate.*
- II. *Authority and duty of a trustee.*
- III. *Trustee's accounts. Allowances to, and charges against trustee.*

I. How trusts are created, and their incidents. Cestui que trust and trust estate.

- 1. If A. purchase an estate with his own money, and takes a deed in the name of B., a trust results to A., and such resulting trust may be proved by parol. *Botsford v. Burr*, 405
- 2. Parol evidence is also admissible to rebut or destroy a resulting trust. *ib.*
- 3. If the person who sets up a resulting trust has, in fact, paid no part of the consideration money, he will not be allowed to show, by parol proof, that the purchase was made for his benefit. *ib.*
- 4. If part only of the consideration is paid, the land will only be charged with the money advanced *pro tanto*. *ib.*
- 5. Any payment or advance of money after the purchase has been completed, will not raise a resulting trust. *ib.*
- 6. A resulting trust is within the statute, sess. 24. c. 30. s. 7. 1 *N. R. L.* 147., and an infant may be decreed to convey such trust, it being established by parol proof. *Livingston v. Livingston*, 537

Cestui que trust, when to be made party to a suit, *vide* PLEADING, I. 2, 3, 4.

Vide EVIDENCE, II. 6, 7, 8. 11. **VENDOR AND PURCHASER, 1.**

II. Authority and duty of a trustee.

- 7. If a mortgagee, executor, trustee, tenant for life, &c., having a limited interest, gets any advantage by being in possession, or otherwise, in obtaining a new lease, he is not allowed to retain it for his own benefit, but must hold it for the mortgagor, or *cestui que trust*. *Holridge v. Gillespie*, 30
- Vide* *Danoue v. Fanning*, 257
- 8. Where the plaintiff assigned the lease of a farm to secure the payment of a debt due to the defendant; and the parties, afterwards, entered into an agreement, by which the plaintiff, in consideration of a sum of money expressed, but not, in fact, paid, agreed to give up to the defendant one half of the farm, and the defendant entered into possession of the premises, and surrendered the lease to the landlord, and took a new lease for an extended term of years; it was held that the plaintiff was entitled to redeem the whole premises, and on such redemption, to have the entire benefit of the new lease. *Holridge v. Gillespie*, 30
- 9. Trustees will not be held responsible on slight grounds, or where there is evidence of fair and upright intention. *Hart v. Ten Eyck and others*, 76
- 10. Every advantage gained by a trustee belongs to the *cestui que trust*. *S. C.* 104
- 11. It is the duty of a trustee not to bring the property to sale until all information has been acquired by him for the benefit of the *cestui que trust*, under circumstances likely to make it yield its utmost value. *S. C.* 110
- 12. A mere nominal trustee cannot bring a suit in his own name, but the *cestui que trust* must be joined. *Malin v. Malin and others*, 238

13. If a trustee, or person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestui que trust* are entitled, as of course, to have the purchase set aside, and the property reëxposed to sale, under the direction of the Court. *Davoue v. Fanning and others*, 252
 14. Unless the trustee has fairly divested himself of that character. *ib.*
Vide *Hendricks v. Robinson and others*, 311
 15. And it makes no difference in the application of the rule, that a sale was at public auction, *bona fide*, and for a fair price, and that the executor did not purchase for himself, but a third person, by previous arrangement, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the *cestui que trusts*, and had an interest in the land under the will of the testator. *Davoue v. Fanning and others*. 252
 16. Where a trustee, pending a suit against him for a breach of trust, fraudulently sells the trust estate, and assigns the securities taken for the purchase money, the *cestui que trust* may either disregard the sale, and take the land, or affirm the sale, and take the bond and mortgage, or other securities assigned; he cannot have both, but must make his election, *Murray and Winter v. Lylburn and others*, 441
 17. Whether the *cestui que trust*, in such case, could take money, negotiable paper, or movable and personal property, the proceeds of the trust estate, and fraudulently disposed of by the trustee? *Quære. ib.*
 18. But where the purchaser or assignee of the securities had no actual notice of the pendency of the suit, costs were not decreed against him. *ib.*
- Vide CORPORATION, 5. 7. NOTICE, 1, 2.
- III. *Trustee's accounts. Allowances to, and charges against trustee.*
19. A trustee is not chargeable with more than he has received of the trust estate, unless there is evidence of gross negligence amounting to wilful default. *Osgood and others v. Franklin and others*, 1
 20. If a person, having charge of the property of another, so confounds it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion; if he cannot distinguish and separate his own, he will lose it; and if damages are given to the plaintiff, the utmost value of the article will be taken. *Hart v. Ten Eyck and others*, 62
 21. Where a trustee has sold land, contrary to his trust, he is answerable for its value, not as it existed at the time of the sale, but at the time of filing the bill. *ib.*
 22. Where a trustee sells stock contrary to his trust, the *cestui que trust* is entitled, at his election, to have the trust replaced, or the produce of it, with the highest interest. S. C. 117

U.

USURY.

1. This Court will order a defendant to account for moneys overpaid, beyond the legal interest, in pursuance of a usurious contract. *Dey v. Dunham*, 163
2. The defendant, at the hearing, cannot avail himself of the *limitation* in the act against usury, unless the same has been pleaded

- or insisted on in his answer. *Dey v. Dunham*, 182
3. Where the defendant advanced his notes to the plaintiff, for his notes for the same sums, payable at or near the same periods, for which exchange the defendant received a commission of two and a half per cent. on the amount, and the notes, when they became due, were renewed, and new notes given in exchange, and this renewal and exchange were repeated many times, and the defendant, on each renewal and exchange, received a commission of two and a half per cent., but which was less than the lawful interest on the amount of the notes, for each time they had to run; this was held not to be usury, but a compensation only for a loan of credit and risk. *ib.*

V.

VENDOR AND PURCHASER.

1. Where a trustee, pending a suit against him, for a breach of trust, fraudulently sells the trust estate, and assigns the securities taken for the purchase money, the *cestui que trust* may either take the land, and disaffirm the sale, or affirm the sale, and take the bond and mortgage, or other securities assigned; he cannot have both, but must make his election. *Murray and Winter v. Lytburn and others*, 441
2. A purchase, *pendente lite*, of the subject matter of controversy, does not vary or affect the rights of the parties to the suit. *ib.*
3. A purchaser of land, who has paid part of the purchase money, and given a bond and mortgage for the residue, and is in the un-

disturbed possession, will not be relieved against the payment of the bond, or proceedings on the mortgage, on the mere ground of a defect of title, there being no allegation of fraud, nor any eviction, but must seek his remedy at law, on the covenants in his deed. *Abbott v. Allen*, 519

4. If there be no fraud, and no covenants taken to secure the title, the purchaser has no remedy, on a failure of his title, either at law, or in equity. S. C. 523
5. Where the vendee gave a bond and mortgage, to secure the purchase money, and an action of ejectment was afterwards brought against him by a person claiming a paramount title, and the vendor brought a suit on the bond, and advertised the premises for sale, under a power contained in the mortgage, the proceedings on the bond and mortgage were ordered to be stayed, until the action of ejectment against the vendee was determined, and the further order of the Court. *Johnson and others v. Gere*, 546

VOLUNTARY CONVEYANCE.

Vide FRAUDULENT CONVEYANCE, 4.

W.

WASTE.

Vide INJUNCTION, I.

WATER COURSE.

Vide INJUNCTION, III. 9. PRESCRIPTION. STREAM OF WATER.

WILL.

1. A testator bequeathed legacies to each of his seven children, "to be paid out of the bulk of his estate;" and if the executors found that the estate fell short of the amount of legacies, then they were to make an abatement in proportion; and he afterwards directed that so much of his real estate as should be necessary to furnish the sums bequeathed, should be sold at public auction, when his children should attain full age, and the remainder be leased by his executors; and that when the youngest child arrived at full age, all his real estate and property, not otherwise disposed of, should be sold, and the proceeds, with the amount of the personal property, be divided among his children, &c. It was held, that the intention of the testator, as collected from the will, was, that his executors were the persons to sell, and that the sole acting executor had power to sell the real estate under the will. *Davoue v. Fanning and others*, 252
2. The real estate is not charged with the payment of legacies, unless the intention of the testator, to that effect, is expressly declared, or clearly to be inferred from the language and dispositions of the will. *Lupton and Pearsall v. Lupton and others*, 614
3. The usual clause devising all the rest of his real and personal estate not before devised, is not sufficient to show an intention to charge the real estate; nor is the mere direction that all debts and legacies are to be paid. *ib.*
4. But if the real estate be devised, "after payment of debts and legacies," it is charged with the payment of them. *ib.*

Vide POWER, 4.

WITNESS.

Vide EVIDENCE, III.

END OF VOLUME II.

HARVARD LAW LIBRARY



3 2044 057 654 550

HARVARD LAW LIBRARY

